

J-11-79

Parsons Law:

O R,
A V I E W. of
ADVOWSONS.

Wherein is contained the Rights of
the Patrons, Ordinaries and Incumbents;
to Advowsons of Churches, and Benefi-
ces with Cure of Souls, and other Spi-
ritual Promotions.

Collected out of the whole Body of
the Common Law, and some late
R E P O R T S.

By *William Hughes* of *Grays-Inne*, Esquire.

The Third Edition, Reviewed and much
enlarged by the Author in his Life-time, and pur-
ged from sundry Errors in the former Editions,
and Published now.

Hor.

*Si quid novisti relatius istis,
Candidus imperti: si non, his utere mecum.*

London, Printed for *W. Leak, T. Bassett, S. Heyrick,*
and *G. Dawes.* 1673.



ADVERTISEMENT.

THere is an Impression of the *Parsons Law*, with an *Appendix*, said to be Printed by *J. Streater*, *H. Twysford*, and *Eliz. Fleisher*, 1673. which was Printed without the knowledge of the Owners of the Copy, and the *Appendix* contains nothing but what is trivial and impertinent. There is a Third Impression of this Book in 1673. for *W. Leake*, *T. Bassett*, *S. Heyrick* and *G. Dawes*, according to the Additions and Corrections under the Authors own hand; wherein many material Cases are added in every Chapter, and the Book is thereby enlarged very near a fourth part.

Caveat Emptor.



9-11-79
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OR,
A VIEW of
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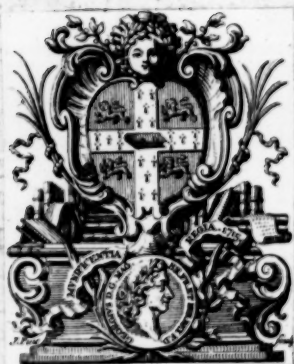
*Si quid novisti rectius istis,
candidus imperti: si non, his utere mecum.*

London, Printed for *W. Leak, T. Basset, S. Heyrick,*
and *G. Dawes.* 1673.

Parton's Law

Vol. 1

ADVO WOODS



1662:10

Printed by J. W. Smith, 2, N. 4th St. N. Y.



The Authors Dedication of the
Second Edition of this Book.

*To all the Reverend Clergy
of the Kingdom of En-
gland.*

Reverend Sirs,

THis little Treatise (cal-
led *Parsons Law, or A
View of Advowsons*)
A *Compendium* of the
Rights, Titles, and In-
terests of Patrons, Ordinaries and
Incumbents to Ecclesiastical Digni-
ties, Spiritual Promotions, Church-
es, and Benefices with Cure, was
first written by me, at the earnest
request of some Eminent men of
the Clergy, in *An. Dom. 1634.* to
whom I delivered several Manu-
script-Copies thereof, (as also to
many other Honourable and Wor-
thy

The Epistle Dedicatory.

thy Persons) for their private use. In *An.* 1636. the Tenth year of the Reign of the late King *Charles* the First over *England*, &c. (of blessed memory,) I delivered a perfect Manuscript-Copy of it to the Right Honorable, the then Lord Chief Justice of his Majesties Court of Kings Bench, to overview it, and have his Approbation of it ; who (finding it so much to concern the Church and Church-men in their Temporals,) recommended it to the Right Reverend Father in God, *William* then Lord Archbishop of *Canterbury* ; who likewise perused it, and transmitted it to some Learned Doctors of the Canon and Civil Laws, to consider whether there was any thing in that Manuscript, which might be prejudicial to the Church : Those Doctors kept it some time in their hands, but at length returned it to the said Archbishop of *Canterbury* his Grace, together with their signification, that what was written in that Treatise, was for the Benefit and Advantage of
of

The Epistle Dedicatory.

of the whole Clergy in general, and no ways against the Laws or Liberties of the Church: Whereupon his Grace returned it to the said Lord Chief Justice; and his said Lordship thereupon, not only gave his Licence, but laid his Command upon me, for the Imprinting and Publishing of it for the publick good. It lay afterwards by me for some time: But in *Anno 1641.* (at the Importunity of some friends) it was first Imprinted for the Author, and published: And it found good Acceptance of, and from the whole Clergy.

In the time of the Long Parliament, and the late unhappy War, and differences between the said late Kings Majesty and his Parliament and People, (notwithstanding that by Power and Prevalency (without the King) the Dignities of Bishops, Deans and Chapters, and other Spiritual Promotions, and their Lands, Possessions and Rights, were usurped upon, and illegally taken away by an Ordinance of

The Epistle Dedicatory.

Parliament only. Nay, although that afterwards, *viz.* in the time of the Usurped Powers over the people of this Nation, it was endeavoured to take away the whole Maintenance and Livelyhood of the Ministry, by the abolishing of Tythes, the chiefest part of their Subsistence : Yet (in the height of all these Illegal Transactions) this Little Treatise stood still on foot ; was not called in, or forbidden, or so much as opposed, or ever questioned, it having received such a Worthy and Legal Approbation as aforesaid.

Since the most happy and right-ful Restoration of his most Excellent the Kings Majesty that now is, to his Imperial Crown and Dignity over the Kingdom of *England*, and his other Dominions ; as also of the restoring Bishops, Deans and Chapters, and other Spiritual persons to their Prime, Original, and Legal Spiritual Livings, Dignities, Promotions and Incumbencies, and to their Rights and Interests of, in,
and

The Epistle Dedicatory.

and to the same : I have been again requested by some Reverend Divines, to review my first Work, and to add what I should think fit and requisite for the further Illustration and Confirmation of their former Rights and Interests ; which I have done, adding here and there, (as occasion did arise) several Cases taken out of the late Reports of some Reverend Judges, and other approved Authors for the same purpose. I hope I may say of this little Treatise, (without ostentation) that it is *Magnum in parvo* ; it being a Legal Comprehensive of all the Rights and Interests of the persons before mentioned : inasmuch (as I humbly conceive) there is scarce any doubt or Question which may hereafter arise concerning the same, or any of them, which may not receive a clear Resolution from some Cases herein, or by a Legal and just Consequence deduced from them.

The first Edition I published without any Epistle Dedicatory. I
con-

The Epistle Dedicatory.

considered with my self, to whom I should offer, and present this Second Edition. I could not think of any so fit persons, as to you the Reverend Clergy of this Kingdom, for whose sakes and uses it was first Written and undertaken: To you therefore I commend it, and commit it, not doubting of your favourable acceptance of these my weak endeavours therein: And hoping that it may some way tend to the lessening of Suits in Law, settling of Peace between you and others concerning your Rights and Interests in Temporals, and also redound to the publick good of the whole Nation; which is the desire of him, who is

From my Study in *Grayes-Inn*, Decemb-19. 1662.

*Your Well-wishing Friend,
ever to be Commanded,*

WIL. HUGHES.

THE



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Parsons



Parsons Law,

O R A

View of Advowsons.

CAP. I.

Of Archbishops and Bishops, and of their Election, Confirmation, Consecration, and Investiture; And when their Temporalities shall be delivered unto them.



AN Archbishop is a Spiritual person Secular, who hath Jurisdiction in all Causes and things which are Ecclesiastical, in a Province within the Realm whereof he is the Archbishop.

In the Realm of *England* there are but two Provinces, viz. *Canterbury* and *York*; The Archbishop of *Canterbury* is at this day stiled, *Metropolitanus &*

vid. Math. Parker. Antiquit. Brit. fo. 111.

B *Primas*

Ranulph Cistren.
lib. 2. cap. 57.
16 Eliz. Dyer,
317.

Cook 1. part, 7
Institur. 94.
Matthew Par-
ker Antiquit.
Britan. 20,

Primas totius Anglia; the Archbishop of York, is *Primas*, & *Metropolitanus Anglia*.

Each of these Archbishops hath in his Province suffragan Bishops of the several Provinces; The Archbishop of *Canterbury* hath under him within his Province, *Rocheſter* his Principal Chaplain, *London* his Dean, *Wincheſter* his Chancellour, *Normich*, *Lincoln*, *Ely*, *Chicheſter*; *Salisbury*, *Exeter*, *Bath* and *Wells*; *Worceſter*; *Coventry* and *Lichfield*, *Hereford*, *Landaffe*, *St. Davids*, *Bangor* and *St. Afaph*, *Glouceſter*, *Briſtol*, *Peterborough* and *Oxford*.

Suffragan or Titular Bishops have been accuſtom'd to be had in this Realm for more ſpeedy Adminiſtration of the Sacraments, and other good, wholeſome and devout things, and laudable ceremonies, and are to be only of ſeveral Towns, particularly mentioned in the Stat. 26 H. 8. c. 14. Two are to be preſented by the Biſhop, one whereof the King allows, and the Archbiſhop is to conſecrate him. For which ſee that Statute.

The Archbiſhop of *York* hath under him, within his Province, The Biſhop of the County Palatine of *Cheſter*, erected and annexed by King *Henry* the 8. to his Province; The Biſhop of the County Palatine of *Durham*; The Biſhop of *Carlile*, and of the *Iſle of Man* annexed

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3

nexed also to his Province by King Henry the 8.

The Archbishop of Canterbury hath the Precedency of all the Clergy within the Realm of England, and is ranked before all the Nobility of the Realm, viz. next and immediately after the Kings Children, Brothers, &c. And in all ancient Charters, Statutes, and Acts of Parliaments, the Bishops were ever named before the Temporal Lords; as appeareth by the Statutes of Magna Charta, and Charta de Foresta; Henricus Dei gratia, &c. Archiepiscopis, Episcopis, Comitibus, Baronibus, &c. and by other Statutes.

All the Archbishopricks and Bishopricks within the Realm of England were of Kings Foundations, and the Kings of England were the Founders of them all: At the first they were Donative, per traditionem Baculi Pastoralis, & annuli; Which was a Symbol of a Spiritual Marriage betwixt them and the Church; But afterward King John, by his Charter 15 Januarii, Anno Regni sui 17. De communi consensu Baronum, granted, That they should be ever after Eligible; And after that time came in the Conge d'Eslier.

Vid. Cook 3. part 14. in Cawdries case.

Vid. Stat. 1 Jac. cap. 3. 17 E. 3. 40. Henry 1. made Rodolph Bishop of London, Archbishop of Canterbury, & illum re-vestivit, per annum & Pastoralis baculi.

Vid. Cook 1. part Institut. 344.

In Antient time by the Common Law; the Founders and Patrons of Churches and Benefices, had a full and an absolute inheritance in them, and upon e-

Br. tit. *Present-*
ment al Esclise. 41.
 6 H. 7. 14. 19 E. 3.
 tit. *Qu. Imp.* 60.
 Selden tit.
 Dism. cap. 6.
 fo. 91.

every vacancy might have conferred them upon Incumbents, without Admission, Institution and Induction of the Bishop by Livery, or delivering unto them the ring of the Church door. And the Investiture of Bishops (as before is said) were only *per Annulum, & Baculum*. But by General Councils, afterwards, the Right not only of Investiture, but of Institution and Induction of Incumbents of Churches were transferred to Bishops and others.

Bishops hold their Temporal Possessions of their Bishopricks *per Baroniam*, as appeareth *Ex Rett. Pat. De anno 18 Hen. 3. Membr. 17. viz. Mandatum est vobis. Episcopis qui Communitati sunt apud Gloucestriam die Sabbath, in Crastin. Sancta Katharina, firmiter inhibendo, Quod siue Baronias suas, quas de Rege Tenent, diligunt, nullo modo presumant Concilium tenere de aliquibus que ad Coronam Regis pertinent, vel que personam Regis, vel statum suum, vel statum Concilii sui contingunt. Et Seaturi pro certo, quod fidefecerint, Rex inde se Capiat ad Baronias suas.* And they sit in Parliaments as Barons, by reason of their Temporal possessions.

Mich. 26 Eliz. in B. R. Fr. Lord Pa-
gett, and Bishop of Coventry and Lich-
field. The Bishop was indicted of Tres-
passe, and challenged the Array return-
ed by the Sheriff, because no Knight was
returned, and the challenge adjudged
good

Rett. Pat. 18. H.
3. Membr. 17.

good : because he is Peer of the Realm :
and upon Tryal of a Peer a Knight ought
to be return'd. 1. *Leon.* p. 5.

The Diocess of every Archbishop and
Bishop, is divided into Archdeaconries,
according to the extent of the Bishop-
rick : Whereof some are by Prescripti-
on, as the Archdeaconry of *Richmond*
is ; Some are *de jure* by the Law, and
some are by Covenant and Contract
made between the Bishop and the Arch-
deacon. When the Archdeacon hath
his Jurisdiction by Covenant, or Con-
tract, the same doth not take away the
Jurisdiction of the Bishop ; as the same
doth, where the Archdeaconry is holden
by Prescription, or *de jure* : For if the
Bishop doth hold plea, or doth inter-
meddle with any thing within the jurif-
diction of the Archdeaconry by Cove-
nant or Contract, the Archdeacon can
only have an Action of Covenant a-
gainst the Bishop : But if the Bishop
doth intermeddle within the Archdea-
conry, where the Archdeaconry is by
Prescription, or *de jure*, in such case the
Archdeacon may have a Prohibition a-
gainst the Bishop. All which hath late-
ly been adjudged in the Court of Kings-
Bench, *Trin.* 21. *fac.* in *Castrel* and *Jones*
Case.

The Archdeacon is *Oculus Episcopi* :
And there are 60. Dignities of Arch-
deaconaries within the Realm of *England*;

17 E. 3. 23. *Coo.*
5. part. in *Caww*
diles case.

1 H. 6. 3. by
Chaucirell.

Coo. 1. part.
Institut. 94.

and these are divided into Deaneries, and Deaneries into Parishes, Towns and Hamlets.

*Vid. 3. Car. in
Evans and Af-
coughs case.
Larch. Reports,
245.*

To the Creation of every Archbishop and Bishop, there are necessarily required three things. 1 Election. 2. Confirmation. 3. Consecration and Investiture: The Election is as the Solicitation, the Confirmation is as the Contract, the Consecration is the Consummation of the Spiritual Marriage; The Restitution of the Temporalities, is as it were the bringing home of the wife.

*Vid. The Statute of 25 H.8, cap. 30.
Note, by an Act of Parliament, 1 E.
6, cap. 2. It is Enacted, That all Bi-
shops from thenceforth should not be
Elective but Donative by the Kings
Letters Patents. And 2. That all Sum-
mons, Citations, and Process in the
Ecclesiastical Court, should be made in
the Name and Style of the King: and
the Certificates made in the name of
the King: But it was resolved, 4 Jac.
by all the Justices, that the said Act of
1 E.6. cap. 2. is now repealed by the
Act of 1 El. cap. 2. and that this Act of
25 H.8, cap. 27, as to the Election of Bi-
shops, stands now in full force, as to
both the said points. Cook 12. part.
7. 8.*

1. Election is made after this manner, *viz.* A Licence under the Great Seal of *England* is granted to the Dean and Chapter of the Cathedral Church, when the See of such Archbishop or Bishop is void, to proceed to the Election of a new Archbishop or Bishop, with a Letter Missive, containing the person whom they shall Elect or Choose to the said Archbishoprick or Bishoprick being void: This Election must be within twelve dayes after the Licence and Letters Missive are delivered unto them.

them. (If the Dean and Chapter, after the Letters Missive delivered, do refuse or neglect to make the Election, they run into danger of a *Præmunire*.) And if the Dean and Chapter defer their Election above twelve days after they have received the Licence, and the Letters Missive ; Then, and in such case, the King doth use by his Letters Patents under the Great Seal of *England*, to nominate or present the person to the Office and Dignity of a Bishop being void; And such Nomination or Presentment, if it be to the Office and Dignity of a Bishop, is usually to the Archbishop or Metropolitan of the Province where the See of the Bishop is void: But if such Nomination or Presentment be made by the Kings Majesty, for default of Election of the Dean and Chapter unto the Office and Dignity of an Archbishop ; Then the King by his Letters Patents under the Great Seal, doth Nominate or Present such Person as he shall think good to have the Dignity, unto one Archbishop and two other Bishops, or else to four such Bishops of the Realm as shall be assigned by his Majesty : But if the Dean and Chapter, do after the Licence and Letters Missive, elect the person nominated in the Letters Missive, according to the Kings pleasure therein ; Then is the Election well made ; And upon Certificate made

Vid. Stat. 25. H. 8 cap. 20. sect. 3. Rastal, Vid. Cook, 12. part. Reports 59. ac. in the Case of Præmunire. Mich 17. Jac. in Revan O Brian, and Knivans Case Cro. 554. The King before the Statute of 1 Eliz. made in Ireland for creating of Bishops there might by his Letters Patents create a Bishop by his Patent, without a Writ of Consecration, which is but a form or Ceremony which the Kings have agreed to observe. 2. Resolved that a Commission to the Archbishop of Dublin and others, to consecrate him is a sufficient Patent of Consecration, wherein are words, Eligimus, Creamus, Constitimus.

of such Election unto the Kings Majesty under their common Seal, the person elected is reputed and called Lord Bishop Elect.

Mich. 22. Jac.
Larch. Reports,
246. 381 E. 3. 31.

By this Election he is not absolute Bishop to all purposes; He is a Bishop *Nomine* only, *non re*; *Non habet Potestatem jurisdictionis neque Ordinis*. He is but as *Embryon in ventre*, till his Confirmation and Consecration: For if a man be but elected a Bishop, if there be cause to bring a Writ of Right in the Court of a Mannor which doth belong to his Bishoprick, the Writ shall not be directed *Episcopo*, but *Ballivis* of the Bishop Elect. Neither doth Election of any person to any such Archbishoprick or Bishoprick, if he was before Parson or Vicar of any Church Presentative, or Dean of any Cathedral, or held any other Episcopal Dignity, make the first Benefice, Deanery, or Dignity to be *ipso facto* void in Law; For that it hath been adjudged, that a *Commendam retinere* made to such a person of such Parsonage, Deanery, or other Dignity which the said Parson had before he was Elected Bishop, comes time enough in Trin. Term. 11 Jacob. in the Common Pleas in *Colt* and the Bishop of *Coventry* and *Litchfields* Case: and in Pasch. 3. Car. 1. in the Kings Bench in *Evans* and *Ascoughs* Case, which Case see now at large reported.

Vide Colt and the Bishop of Coventry and Litchfields case in Hobbes Reports.
Tr. 3. Car.
Evans & Ascoughs case,
Larch. 237.

If an Abbot pendant a Writ brought against him be made and created Bishop, the Writ shall not abate, because the Creation of him a Bishop is not his own act, but the act of another, viz. of the King. And Election only of one to a Bishoprick, who had before a Benefice of Cure, or any other Ecclesiastical Dignity or Promotion, doth not make a Cession of it; for if it should, it should be to the prejudice of the party.

*vid. 9 H. 5. 13. ad
by Halls.*

*20 E. 3. Fitz.
tit. Brief, 25.*

The second thing incident to the Creation of an Archbishop, or Bishop, is, Confirmation, Consecration and Investiture. This was anciently done by Bulls and Breves from the Bishop of

38 E. 1. 39.

Rome, who claim'd a Spiritual jurisdiction in this Realm. But now, since the Statute of 25 H. 8. cap. 20. the same is done by the Archbishop, or Metropolitan of the Province in which such Bishoprick is void, with such Benedictions and other Ceremonies as are requisite:

*V. Stat. 25 H. 8.
cap. 20.*

But it is to be noted, That before the Archbishop, or other Bishop is Confirmed, Consecrated, or Invested, He must take an Oath of Fealty unto the Kings Majesty only, and then, after such Oath taken, and fealty done only to the Kings Majesty, the King doth under his great Seal signifie his Election to one Archbishop, and two other Bishops, or else unto four Bishops within his Majesties

Domi-

Dominions, thereby commanding them to confirm his Election, and to Consecrate and Invest the person, and to use such Benedictions, and other Ceremonies as are requisite thereunto.

V 41 E. 3. Sti. tir.
Qu. Imp. 129.
V. Coe. 8. pr. in
Trollops case.
41 E. 3. 10, Fitz.
N.B. 64.

18 Eliz. Dyer.
350.
22 E. 3. 13.

If the Archbi-
shop of Cant. be
consecrated.

Quere, If he may
before he is en-
thron'd grant a
Dispensation to
a Parson to ac-
cept a Plurality.
within the Sta-
tute of 21 H. 8 of
Pluralities.

41 E. 3. 6.
46 E. 3. 22.

After his Confirmation and Consecration he is compleat Bishop to all purposes, as well to Temporalities as to Spiritualities. And then he hath *plenam potestatem Jurisdictionis, & Ordinis*: And therefore after he is Consecrated he may Certifie an Excomengment: When he is Confirmed, the power of the Guardian of the Spiritualities doth cease. 18 Eliz. Dyer. 350. and v. 22. E. 3. 13. Where a Writ awarded *Episcopo Electo & Confirmato*, to admit a Clerk to a Benefice, was holden good.

When he is Consecrated, he may Confer Orders upon others, and may Consecrate Churches, or Chappels, which he could not do before his Consecration: For although by his Confirmation, *Conjugium contrahitur Spirituale*; (as before is said) yet by Consecration, *Consumitur*.

After that he is Confirmed, and before he is Consecrated Bishop, the King may by his Letters Patents grant unto him his Temporalities, and such Grant shall be good: But such a Grant from his Majesty is *potius de gratia quam de jure*. But after that he is Consecrated, Invested and Installed in his Bishoprick, he

is

Cap. I. Parsons Law.

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is fully enabled for to sue for his Temporalities out of the Kings hand by a Writ *de restitutione Temporalium* directed to the Escheator; and so he shall enjoy the Actual possession of them: But yet the Temporalities are not *de jure* to be delivered unto him until the Metropolitan hath certified the time of his Consecration, although the Freehold of the temporalities be in him by his very Consecration, as the Book in 38 E. 3. 30. is, 38 E. 3. 30.

If a Bishop of one Diocese be translated to a Bishoprick in another Diocese, there needs no Confirmation, or new Consecration of him, for that Consecration once had is *Character indelibilis*; And although for Cause, or Crime, he may afterwards be deposed and removed from the See, or may be suspended *ab Officio & Beneficio*, that is to say, from the Execution of his Spiritual jurisdiction, and from the Receiving the Temporalities and Profits of the Bishoprick: Yet still he retains the title of a Bishop, for that the Order cannot absolutely be taken from him, being (if not by Divine) yet by Apostolical Institution. Tr. 3 Ca. B. R. in
Evans and AL
coughs case,
Litch. 837.

Tamen Quare.

Note, There is a double power in a Bishop, viz. *Potestas Ordinis*, which is common with other Ministers. 2. *Potestas Jurisdictionis*, viz. to admit, in-
stitute, deprive, excommunicate, and this is *Jura Canonico & Positivo*.

CHAP.

CAP. II.

Of Deans and Chapters, and of their Elections : How all persons belonging to Cathedral Churches held their possessions at the first together ; And how, and by whom they came afterwards to be divided and severed.

EVERY Archbishop and Bishop hath a Dean and Chapter consisting of Spiritual and Ecclesiastical persons. There are four sorts of Deans or Deaneries ; of which, and of whom the Law of this Realm taketh knowledge. The first is a Dean who hath a Chapter consisting of Prebendaries or Canons : For seeing, that it was impossible but that Sects, Schisms and Heresies should arise in the Church, it was in Christian policy thought fit and necessary, that the burthen of the whole Church, and the Government thereof should not lye upon the person of the Bishop only : and therefore it was thought necessary that every Bishop within his Diocess should be assisted with a Council. 1. To consult with them in matters of difficulty concerning Religion, and deciding of the controversies thereof. 2. For the

the better ordering and disposing of the things of the Church, and to give their assent to such estates as the Bishop should make of the Temporalities of his Bishoprick; For it was not thought convenient that the whole power and charge thereof, should remain in any one sole person only; i. e. in the Bishop: and yet was the Dean and Chapter subordinate to the Bishop.

Cook 3. pr. in the case of the Dean and Chapter of Norwich.

The Dean which hath a Chapter, such as the Dean of *Canterbury*, *St. Pauls*, &c. is set forth to be an Ecclesiastical Governour Secular over the Prebendaries and Canons in the Cathedral Church. And the Patronage of

Note: The Dean and Chapter of *St. Pauls Church, London*, claim that they are a Body Corporate by Prescription, and were long before the Norman Conquest: and it seemeth founded in the time of King *Ethelbert the Saxon*: when *Moltin* was Bishop of *London*, when the Cathedral of *St. Pauls* was first Founded: and in Anno. 619. The Mo. of *Tillingham* was given to them by King *Ethelbert*. V. *Dugdale of the Antiquity of St. Pauls Church*, 4 & 181.

all such Deaneries is in the Crown, and doth not belong unto any Subject. The ancient Deans of Chapters come in as Bishops now do by a *Conge de Eslier*, and are confirmed by the Bishop: But those Deaneries which were translated from Priories and Covents; or which were founded after the Dissolution of Abbies and Monasteries by King *Henry the 8.* or other Kings of this Realm, are now Donative, and by the Kings Letters Patents they are Installed.

Cook 1. pr. Inst. tut. 99.

The Chapter are the Prebendaries or Can-

Cannons (as before is said) and is *Clericorum Congregatio sub uno Decano in Ecclesia Cathedrali*. Some Chapters are Ancient, and some Later : the Later are of two sorts. 1: Those which were founded or translated by King *Henry* the eighth in the places of Abbots and Convents, or Priors and Covents which were Chapters whilest they stood : and these may be said to be new Chapters, but belonging to old Bishopricks: 2. They are said to be new Chapters which are annexed unto new Bishopricks founded by King *Henry* the eighth : such as were *Bristol, Chester, Oxford*.

The second Dean, is a Dean who hath no Chapter; and yet he is Presentative, and hath Cure of Souls; Who hath a Peculiar and Court, wherein he holdeth Ecclesiastical jurisdiction; but he is not subject to the Visitation of the Bishop or Ordinary : Such a one is the Dean of *Battel* in *Suffex*, which Deanery was founded by King *William* the Conqueror : And the Dean there hath Cure of Souls, and hath Spiritual jurisdiction within the Liberty of *Battel*: and he is Presentable by the Patron unto the Bishop of the Diocess, and is admitted to the Deanery by Institution and Induction by the Bishop of *Chichester*, although he be exempt from the Visitation of the same Bishop: And the Patronage of such a Deanery may

may be in a Subject, as the Patronage of the Deanery of *Battell* a long time hath been, and I believe yet is, and remains in the Family of the Lord Viscount *Mountacute*.

The third Dean is Ecclesiastical also; but the Deanery is not Presentative, but Donative, nor hath he any Cure of Souls; but he is only by Covenant or Condition, and he also hath a Court and a Peculiar, in which he holdeth Plea and Jurisdiction of all such matters and things as are Ecclesiastical, and which do arise within his Peculiar, which oftentimes extends over many Parishes. Such a Dean Constituted by Commission from the Metropolitan of the Province, is the Dean of the *Arch*, and the Dean of *Bocking* in *Essex*; and of such Deaneries there are many more.

The fourth sort of Dean, is he who is usually nominated and called Rural Dean; He hath not any absolute Judicial power in himself, but is only to Order and Prepare the Ecclesiastical affairs within his Deanery and Precinct, by the Direction of the Bishop, or of the Archdeacon, and is a Substitute of the Bishop in many Cases; as in granting of Letters of Administration, Probate of Wills, &c. and took place first upon the Division of Parishes: For (as I said before) The Diocess of every Bishop was
divi-

divided into Archdeaconries, and they into Deaneries, which were these Rural Deaneries, and these Deaneries into Parishes, Towns and Hamlets: But the Power and Jurisdiction of these Rural Deans is now almost lost and extinguished, the same being encroached upon, and as it were swallowed up in the Office of the Archdeacon, and the Bishops Chancellor, who now execute their power and authority throughout all the Diocesses of the Bishops of *England*, although that in other Countreys, and in some part also of this Realm of *England*; the Jurisdiction of these Rural Deans is still in full force.

22 H. 4. 9.

The Bishop, Dean and Chapter; (which were the Prebendaries or Canons, as before is said) and all other persons belonging unto, or having any thing to do in Cathedral Churches, at the first, and in ancient times held their possessions together in gross; but afterwards for the avoiding of Confusion, and for better Order, and for some other special Causes known to the King, and State of this Realm, the same were afterwards by them sever'd and divided; and part of the Lands and possessions belonging to the same Church were assigned to the Bishop and his Successors to hold by themselves, and other parts thereof were assigned unto the Dean and Chapter to hold by themselves; of which

of which Lands they have ever since continued severally seized in their several Capacities. This appeareth more plainly by the Book 17 E. 3. 29. where the Treasurer of a Cathedral Church brought an Assize of some of his possessions in his own Name, and the Defendant pleaded in Barr a Release of the Dean and Chapter, and it was ruled to be no Barr, because that the Treasurer now held his possessions severed from the possessions of the Dean and Chapter, and yet a Lease made of them by the Treasurer, without the Confirmation of the Dean and Chapter, was holden not to be good, but only during his own time, and not to bind his Successor. And also it hath been seen, That the Chapter also hath maintained Writs of their several possessions against the Dean. For the Prior of *Westminster* brought a *Quare Impedit* for a Presentation to a Church which belonged to his Priory against the Abbot of *Westminster*, as was said by *Fitchden*, 40 E. 3. 28. wherewith agreeth the Book of 20 E. 3. Fitz. title Nonability 9.

All Archbishops, Bishops, Deans, Prebendaries, Archdeacons, Parsons, Vicars, are Secular persons, and are not now Religious, although they are Church-men, or Men belonging to the Church. For no persons are said in Law to be Religious, but such only as

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have

17 E. 3. 29.

17 E. 3. 64. b.

40 E. 3. 28.
20 E. 3. 112. Nonability 9. acc.V. Cook 2. pr.
in the Bishop of
Canterburies
Gale.
21. H. 7. 39.
29 E. 3. 14.

have vowed three things, viz. Obedience to the Sovereign of their House and Order; perpetual Chastity; and wilfull poverty; Or such as are professed in some Religious Order, as the Augustine and Franciscan Monks, &c. Yet may all such Ecclesiastical persons Secular hold Lands in Frankalmoigne, and Lands at this day may be given to them and their Successors to be holden in Frankalmoigne, with the Consent of the King, and of the Lords Mediate and Immediate, notwithstanding the Statute of *Mortmain*. For that *Quilibet potest renunciare juri pro se introducto*; And if they do consist of a sole Corporation or body Politick, as Bishop, Prebendary, Parson, Vicar, &c. a Feoffment may be made to them of Lands in *Libera Elemosina*, either by Deed or without Deed, and the Fee-simple shall pass unto them without the word (Successors.) But if any such Feoffment be made to a Corporation Aggregate of many persons, as to Dean and Chapter, &c. there to pass the Inheritance unto them, there must be the word (Successors) in the *Habendum* of the Deed, and the Feoffment must be by Deed, otherwise it is not good in Law.

CAP.

CAP. III. ●

Of the Capacities of Bishops, Deans and Chapters, Prebendaries, Parsons, Vicars, and other Ecclesiastical persons, to Purchase, Hold, and Grant: And of different Acts and things to be done by them, and to them.

EVery Archbishop, Bishop, Archdeacon, Dean, Prebendarie, Parson, Vicar, or other Corporation Spiritual, Sole, or Aggregate, have a double Capacity in them to Purchase, Hold or Grant. If Lands be given to a sole body Politique or Corporate, as to a Bishop, Archdeacon, Prebendary, Parson, Vicar, there to give them an estate of Inheritance in his or their Politique or Corporate Capacity, there must be these words in the Grant or Deed, *viz.* To have and to Hold to him and his Successors; for without the word (Successors) in such cases the Inheritance passeth not unto them, except (as before is said) in the Case of *Frankalmoigne*: But if Lands be given to a Dean and Chapter, or other Corporation Aggregate, they

7 E.3. 25. 25 E. 3. 35. Cook 1, part Institut. 8.

V. 39 H. 6. 13 & 14. A Writ of Annuity was brought by the Dean and Chapter, It was there said, That the prescription was good to say, That the Dean and Chapter and their Predecessors were seised tin & out of mind, &c. Notwithstanding that it was said, That a Chapter cannot grant a Predecessor nor Successor. V. 12 H. 7. 17. acc.

may have an Inheritance, or a Fee-simple in the thing passed unto them without the word (Successors) for that the said body Politique never dyeth; but then they must take the thing granted in their politique Capacity, and not in their natural Capacity. If the King by his Letters Patents, grants Lands *Decano & Capitulo, &c. Habendum sibi & heredibus, & successoribus suis*; The grant shall run to the Dean and Chapter and his Successors in their politique Capacity, and not to him and his heirs in his natural Capacity.

There is a great difference in things to be done by Corporations Spiritual, which are sole; and Corporations Spiritual which are Aggregate of many persons: 1. If a Sole Corporation, as a Bishop, Prebendary, Parson, Vicar, &c. make a Feoffment in Fee, with a Letter of Attorney for to deliver Livery and Seisin of the Lands, the Livery must be made in the life time of the Bishop, Prebendary, Parson, or Vicar, &c. But if a Dean and Chapter, or other Corporation Aggregate, make a Deed of Feoffment of Lands, with a Letter of Attorney for to make Livery and Seisin, there Livery made by the Attorney after the death of the Dean is good, and shall stand effectual in Law. 2. A Sole Corporation, as a Bishop seized in the right of his Bishoprick, shall do Homage

11 E. 6. 11.

18 H. 6. 9.
21 H. 7. 29. sec.

Cook 1 part
Institur. 52.

Temp. E. 1. Fitz.
Juris utrum. 13.
3 E. 1. 28.

but a Parson or a Vicar who have but a Qualified Fee in them, shall neither do Homage nor receive Homage: Neither shall a Dean and Chapter do Homage, because they cannot do it in person; and Homage must always be done in person: Neither shall a Bishop do Escuage in person, but he shall find an able man to do the same: For it is a Rule, That *Nemo militans Deo implicet se secularibus negotiis*. And the old Books are, That the Homage which a Bishop doth, is rather Fealty then Homage: For that it wanteth the words of Homage, viz. *7eo de veigne vostre home*, &c. Yet in the opinion of Cooke chief Justice, in his first book of Institutes, 63. it is Homage, because he saith, I do you Homage. 3. A Corporation Spiritual Sole, as a Parson, Prebendary, Vicar, &c, who had not the Fee-simple of the Lands in them, could not have charged their Lands or Possessions, without the assent of their Patrons or Founders: But a Corporation Aggregate of many persons, as a Dean and Chapter, Master of a Colledge and Fellows, &c. who had the absolute Fee simple of the Lands in them, might have made Grants, and thereby charged their possessions, or might have discontinued their Lands or Possessions without the assent of their Founders.

3a H.8.B.c.
Fealty 25.

Cook 7. pt. 15a
Cook 10 part,
31. acc.

Glanvil lib.9.
cap. 1.

10 E. 3. 7.
6 E. 3. 10.
9 E. 4. 6.
38 E. 3. 19.

CAP. IV.

Of Leases made by Bishops, Deans and Chapters, Prebendaries, Parsons, Vicars: And where their Leases are good by the Statute of 32 H. 8. 1. & 13 Eliz. and other Statutes. Where not.

Cook 5. pt. 14.
Cook 10. pt. 60.
Cook 11. pt. 66.
P. 25 Eliz. C.B.
C. 0. 1. pt. Higgins
and Grants Case:
A Parson before
the Statute of
13 Eliz. made a
Lease for years:
The Patron and
Ordinary confi-
rmed it, after the
Statute, and re-
solved good, for
that the Statute
speakes only of
Alienations, but
doth not make
mention of Con-
firmations.

Cook 1. part.
Instit. 44.
V. Cook 10. pt.
The Bishop of
Salisbury Case.
V. 1. Car. The Bi-
shop of Chester
and Ereslands
the Bridge-
man 30.

EVERY Archbishop, Bishop, Arch-
deacon, Prebendary, Parson, Vi-
car, and other Corporation Spiritual,
by the Common Law might have made
Leases *Concurrentibus his qui in lege requi-
runtur*, for lives or years without limita-
tion, or stint of time. But they are
now by the Statutes of 32 H. 8. Stat. of
1. & 13 Eliz. and other Statutes, re-
strained to make any Leases of their
Lands or Possessions belonging to the
Church, but according to such limi-
tations and under such provisoes
as are mentioned in the said Sta-
tutes.

Now by the Statute of 32 H. 8. which
is an enabling Statute to some persons
and purposes, A Bishop by his Deed,
without the Dean and Chapter: A Par-
son seized in Fee in the right of his
Church, may make Leases under these
Cautions, Limitations, and Provisoes
fol-

following, viz. 1. The Lease must be made in writing by Deed Indented, and not by word. 2. The Lease must begin from the day of the Date thereof, or from the making thereof. 3. The old Lease must be surrendred, expired, or ended within one year at the making of the second Lease, and such surrender must be absolute, and not conditional. 4. There must not be a double Lease in being at one time. 5. The Lease must not exceed twenty one years, or three lives from the making thereof. 6. The Lease must be of Lands or Tenements maynorable, out of which a Rent may be reserved. 7. The Lease must be of Lands or Tenements which commonly have been letten to Farm by the space of twenty years next before the Lease made. 8. There must be reserved to them and their Successors so much yearly rent, or more, which hath been accustomedly used to be paid for the said Lands or Tenements within twenty years before the Lease made. 9. The Statute of 32 H. 8. doth not extend to any Lease to be made without impeachment or Waste.

Cook 5. pt. 6.
in the Lord
Mountjoyes
Case.
Cook 5. pt. 2.
Elmots Case.

Cook 6. pt. 37.
The Dean and
Chapter of
Worcesters
Case.

Cook 5. pt. 6.
Cook 6. pt. 37.
acc.

Cook 6. pt. 37.

A Parson, Vicar, &c. if they make Leases for twenty one years, or three lives, according to the enabling Statute of 32 H. 8. they are out of the Statute, and their Leases must be confirmed by the Patron and Ordinary: But a Bishop

Hil. 31 Eliz. F. R.
3 Cr. 123. Mot.
V. Hales.

29 H. 8. Dyar:
Chaffins case 40.
V. Mich. 11 Jac.
in Car. B. Tre-
land and Barkers
case. acc.

who is seized in the right of his Bishoprick; A Dean of his Sole possessions seized *in jure Diaconatus*; An Archdeacon seized *in jure Archidiaconatus*; and a Prebendary seized *in jure Prebende*; every one of them is seized *in jure Ecclesie*, and may make Leases with the Cautions, and under the Limitations and Provisoos before-mentioned, without Confirmation.

M. 38 Eliz. B. R. Sir Edward Denny, and Ekenstalls Case, Cro. 1. part 430. The Archdeacon of H. having the parsonage of A appropriate to it, let parcel of the Glebe Lands, 12 Eliz. for 50 years, The Bishop of E. Patron of the Archdeaconry and the Dean and Chapter confirmed it, the Archdeaconry dyed, it was resolved the Confirmation of the Bishop was not void, for it was but his assent only to the Lease of the passing of the Archdeaconry, & therefore not within the Statute of 1 Eliz. But whether the Lease was void by the Statute of 13 Eliz. was not resolved, Quære?

A Bishop made a Lease for three lives not warranted by the Statute of 1 Eliz. rendring rent and dyed, his Successor accepted the Rent, adjudged this acceptance of the part should bind him for his time, H. 2. Car. C. B. Owen and Tho. Ap Rees Case, Cro. 3 pt. 67.

M. 31 Eliz. Merter and Wrights Case, Anderson 193. A Bishop made a lease for 21 years, and afterwards 10 of the years bein

being in being, he made another lease for three lives, and afterwards was translated, adjudged the Lease was void on the reason on the book.

If a Bishop maketh a Lease for twenty one years, and all those years are spent or run out saving three or more; yet may the Bishop make a new Lease for twenty one years to begin from the making according to the Exception of the Statute, but not a Lease for life or lives; and such concurrent Lease hath been resolved to be good, as well upon the Exception of 1 Eliz. which extends to Spiritual and Ecclesiastical Corporations, which the Statute of 32 H. 8. did not do; but then in the case of concurrent Lease, in the case of a Bishop, it must be confirmed by the Dean and Chapter: For the making of this good, I shall shew you only two Presidents and Resolutions.

See *Paf.* 38. Eliz. in B. R. in *Wroth*, and the Countess of *Sussex* Case, upon the Statute of 1 Eliz. where it is said it was adjudged in one *Marshals Case*. Where the Bishop of *Canterbury* made a Lease unto him for twenty one years, to begin at the end of the first Lease, was adjudged to be void. But in the great Case which was in the Exchequer Chamber upon this point, there the second Lease was in possession, and to begin presently, and to run out with the other

Marshals Case vouched in *Wroth*, and the Countess of *Sussex* case. *Paf.* 28 Eliz. B. R. *Leonards Reports* 2. pt. 131.

ther Lease; and therefore it was adjudged to be good, because the Land was charged but with twenty one years, and no more.

Pasch. 29 Eliz.
in B. R. Ban-
ney and
Wright's Case.

A. Bishop of *London* Leased parcel of the possessions of his Bishoprick for twenty one years, and afterwards he put out his Lessee, and then Leased the Lands to another for three lives, rendering the antient and accustomed Rent which was confirmed by the Dean and Chapter: Afterwards *A.* was translated to another See; In this case it was resolved by the Justices, That the Lease was warranted by the Statute of 1 Eliz. and in this case it was said, That at the Common Law, a Bishop might make an Alienation in Fee-simple, being confirmed by the Dean and Chapter: But by the Statute of 32 H. 8. Bishops without Dean and Chapter, or their Confirmation, might make Leases for twenty one years, but with their Confirmation they might make Leases for a thousand years: But now by the Statute of 1 Eliz. their power in that is much abridged, for that now with Confirmation or without Confirmation, they cannot dispose of their possessions but for twenty one years, or three lives.

Hill. 15 Jac. B. R. Smith and Boles Case, Cro. 2 part. A Prebend made a Lease for years of Lands parcell of his Prebend, which was confirmed by the Arch-

Archbishop Patron, but not by the Dean and Chapter: the said Lease was with Exception of words. Afterwards he made a second Lease without exception. Resolved the Confirmation of the first Lease by the Archiepiscopal Patron was good without the Confirmation of the Dean and Chapter; but the second Lease made without Exception, was void by the Statute of 13 Eliz.

H. 3 Jac. B. R. 2. Cr. 111. *Talentine and Dentons Case*. A Bishop seised in Fee, (in the right of his Church,) of Tythes, made a Lease for three lives, thereof rendring the antient rent and dyed. Adjudged, the Lease was void by the Statute, 1 Eliz. against the Successor; for that being of Tythes rendring rent, which are things that lye in prender, wherein a distress cannot be taken, nor remedy for the rent if behind, (for that debt lyeth not for it because it is a Freehold) the Lease is void.

A Bishop makes a Lease for 3 lives, of parcell of 5 demesnes of a Mannor not usually let to Farm, which lease is confirmed by the Dean and Chapter, Trin. 43 Eliz. The Bishop of *Hereford* against *Scory*, 33 Cr. 874 Adjudged that this lease is not good, for any ancient rent cannot be served, because the lands were not usually demised.

A Bishop makes a Lease for so many years as I. S. shall name, the Dean and Chap-

Chapter confirms it, I. S. names 21 years, I conceive this Lease is not warranted by the Statute of 1 Eliz. for that the Leases for lives or years within the Statute, ought to be made by the Bishop, without the act of a third person, or his Nomination.

Vid. Cook 3.
part, in Lin.
coln Colledge
Case.

Note, That all Leases not warranted by the Statute of 1 Eliz. and 13 Eliz. stand good against the Lessors themselves, and are voidable only by their Successors. But if a Parson, Dean, Prebendary or Vicar, make a Lease for years or for life, the same is void by his death, by the Statute of 14 Eliz. And if it be for 21 years, or three lives, it were void by the Statute of 13 Eliz. if it be not made according to the Provisoos and Limitations above-mentioned.

Pasc. 19. Eliz.
in C. B.
Hunt and
Singletons
Case, acc.

M. 13 Eliz. B. R. The Dean and Chapter of Herefords case, Cro. 3. pt. 441. If the Dean and Chapter get the next avoidance of a Church, Quære, That good, within the Stat. 13 Eliz.

Tr. 31 Eliz. B. R. Mott and Hales Case, Cro. 3. pt. 123. adjudg'd acc.

Mich. 43 Eliz. Costard and Windors Case, Cro. 3. part. A meer Lay man induced into a Benefice, made a Lease for years of the Rectory, which before 13 Eliz. was confirmed by the Patron and Ordinary, and the Lease was good, and should bind his Successor.

CAP.

CAP. V.

Of Alienations and Discontinuances made by Bishops, Deans and Chapters, Prebendaries, Parsons, Vicars; Where their Grants, Charges, or Leases were good at the Common Law without Confirmation; Where not; And by what Statutes they are restrained to discontinue or alien their Lands or Possessions.

BY the Statutes of 1 & 13 Eliz. and 1 Jac. Bishops and all other Ecclesiastical persons are restrained to alien or to discontinue any of their Ecclesiastical Lands or Possessions; And if they do convey and alien away any of their said Lands or Possessions, although that it be unto the King himself, yet the alienation is void in Law: For although that the King be not expressly named in the Act of 1 Jac. yet the said Statute being made to suppress Alienations, Discontinuances and Wrongs done by Clergy men to their Successors, the King is included in the general words of the Statute, viz. the words *person or persons*.

Vid. Cook 5.
part 14.
Vid. 29. Eliz.
Leon 1 part.
Banney and
Wrights Case.
acc.
Coke 11 pt in
Magdalen Col-
ledge Case.

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1 H. 6. 9.
31 H. 8. br. tit.
charge 40.

If a Bishop had been Patron of a Church; the Bishop could not make any Grant by the Parson or Incumbent of the Lands of his Parsonage good, either by his Licence Precedent, or by his Confirmation subsequent, without the Confirmation of the Dean and Chapter: But if there had been Parson, Patron, and Ordinary, and the Patron and Ordinary had given Licence by their Deed to the Parson to have granted a Rent charge out of the Glebe, and the Parson had made such a grant, the same should have bounden the Successors of the Parson at the Common Law, before the said restraining Statutes, although it had not been confirmed afterwards, and that by reason of the precedent Licence; and also in such case, the Ordinary alone might have agreed to such a Grant of a Rent charge by his Licence precedent, or Confirmation subsequent, without the Confirmation of the Dean and Chapter, because that in that case, the Confirmation or Licence of the Patron had not been good to have made the charge perpetual upon the Church, unless the Patron had had a Fee-simple in the Patronage, which if he had had, then the Grant of the Rent by the Parson *concurrentibus his*, had been good, and should have charged the Lands, and bound the Successors of the Parson at the Common Law, before the restraining Statutes.

31 E. 3. Fitz. tit.
Grant 61.
16 Aff. 38.
9 Eliz. Dyet
252. acc.

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If the Parson and Ordinary grant a Rent charge out of the Glebe to the Patron : *Quære* ? If the Successor shall avoid it, I conceive he shall, because he is but an assent implied and not expressed, and what the Successor shall be charged, the assent of the Patron and Ordinary is to be an express assent, and not an implied assent. Vid. 7 H. 4. 15. Annuity 17. 13 E. 3. Annuity 29. 16 E. 3. Annuity 24. an Implicators assent is not sufficient.

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Note, If the Bishop who is Ordinary be Patron, then the Confirmation ought to be by the Bishop, the Dean and Chapter, and the Ordinary, because the Inheritance is in the Bishop in the right of his Bishoprick ; but where the Bishop is but Ordinary, it is but a Judicial Authority, or *vox patet*, That the Patron ought to have Fee, and that on *jure proprio*.

Now, *Confirmare*, or a Confirmation is but *firmum facere*, and is as it were but an assent to the Act or Deed of the Bishop, Parson, &c. and therefore although the Confirmation had not been always of the estate, yet if it had been but of the Deed of the Bishop, &c. the same had been sufficient. And therefore if a Bishop before the said restraining Statutes of 1 Eliz. and 1 Jacob. had made a Feoffment in Fee of Lands parcell of his Bishoprick : And the Dean and

M. 14 Eliz. in
B. C. Leon 13
pt. 17
P 10 Jac. Walter
and Dean and
Chapter of Nor-
wich Case, Moor
375.

Chapter by their Deed, had confirmed the Deed of the Bishop, the same had been good. So if a Bishop by Deed enrolled, had conveyed Lands unto the King, and the Dean and Chapter had confirmed the Deed of the Bishop, and afterwards the Deed had been enrolled, it had been sufficient to have confirmed the Lands unto the King, although that the Deed of the Dean and Chapter had not been enrolled. For the assent was to be made to the Act of the Bishop, and to him, and not unto the King: But at this day (as I said before) Bishops cannot make any Conveyances, thereby to prejudice their Sees or Successors; Yet this doth not take away the Rule of Law, but that a Confirmation made of the Deed of the Bishop or Parson, at at this day is sufficient, although the estate which is granted by the Bishops or Parsons Deed, is not confirmed: And therefore, if since the Statute of 13 Eliz. a Parson, Vicar, &c. make a Lease for twenty one years or three lives, and the Patron and Ordinary do confirm the Deed of the Parson or Vicar, this shall (as I conceive) make the Lease good to some purposes, and shall be a Confirmation of the Lease it self, although the Term be not thereby confirmed.

If Parson and Ordinary make a Lease for years of the Glebe Lands to the Patron,

tron, and afterwards the Patron doth assign or grant this Lease over to another Parson by his Deed, the assignment is good, and a Confirmation of the first Lease made unto himself: And the Deed of the Patron doth amount to a double intent, viz. both to make the Assignment of the Lease good, & to a Confirmation of that Lease to the Assignee.

Vid. 17 El. 2 in Scaccario, Hodges and Newmans Case. Hughes Abridgements 3 pt. 186.

There is a difference betwixt a Confirmation of the Term, and a Confirmation of the Lands: And therefore if before the Statute of 13 Eliz. a Prebendary had made a Lease for seventy years of the Corps of his Prebend, and the Bishop Patron of the Prebend, and the Dean and Chapter had confirmed *dimissionem prædictam* for fifty years, & *non ultra*, the Confirmation had extended to the whole Term, and the Word (for fifty years & *non ultra*) had been void. But if the Bishop and Dean and Chapter, had recited the Lease for seventy years, and had confirmed the Lands to the Lessee for fifty years, the Confirmation had been good for those fifty years only.

Cook 5 parts 81. Ford. case. vid. Andersons Reports 1 pt 47. Be (forth and Fords Case acc.

If a Bishop hath two Chapters, (as there may be two, or more unto one Bishoprick,) both of the Chapters must confirm Leases made by the Bishop: But if one of the Chapters after the Date, or making of the Lease be Dissolved, there a Confirmation by the Chapter which is in being, is sufficient

Temps. R. 2. Fitz. in grants 104. 10 E 3 title Assize in Stratham acc. v. 11 El 2. Dyer. 182.

D to

Cook 1. part.
Institute 301.

to make the Lease good ; and in such Case, there needeth not any Confirmation of the King, who is Supream Patron (as before is said) of all the Bishopricks in England.

Co. 12. Rep. 71. Two Bishopricks united, the Chapters remaining several, The Bishop may alien lands with confirmation of the Chapter only, which formerly belonged to that Bishoprick ; because (unless the union be produced) it shall be intended, that the Union was made especially in such manner. But if the Union be produced, it seems it shall be regulated according to the Union.

V. This Case Reported 2. Car. in
Latches Reports, 234.

If a Dean of a Cathedral Church be elected Bishop of another See, with a Dispensation *retinere Diaconatum in Commendam*, If after the Bishop of that See (whereof he was the Dean and Head of the Chapter) do make a Lease of parcel of the possessions of the Bishoprick, the Confirmation of the Lease by the Commendatory Dean is good, as it was adjudged in 3 Car. in the Kings Bench in *Evans and Asconghs Case*.

43 E. 3. 33.

There is another Rule in Law, viz. That *Praelatus Ecclesie sue conditionem meliorare potest, deteriorare nequit*: And therefore if a Bishop, Parson, &c. purchaseth Lands to him and his Successors, he himself afterwards cannot wave the purchase ; but his Successor upon just Cause

Cause shewed, viz. upon Cause shewed;
That the Rent to be paid upon the purchase is of greater yearly value then the Land purchased is, may waive such purchase made by his Predecessor. And so, ^{46 E. 3. 27.}
if a Prebendary, Parson, Vicar, or other Corporation Spiritual be seized in ^{5 E. 4. 1.}
the right of their Churches, They cannot disclaim in that thing which was ^{6 E. 3. 51.}
seized in the Church, because they cannot divest by their Disclaimer that thing which was vested in their Church: But if a *Quo Warranto* be brought against ^{26 H. 6. 46. a. by Markham.}
such Bishop, Prebendary, Parson, &c. by the King for Liberties, or Franchises usurped by them from the King: in such special Case they may disclaim in the said Liberties or Franchises, and such Disclaimer shall bind their Successors. ^{6 E. 3. 52.}

If a Bishop make any Lease, grant any Rent-Charge, enter into any Warranty, or doth any other act or thing, which tendeth to the Diminution of any of the Revenues which ought to be, and continue for the maintenance of his Successor; If the Bishop be deposed, translated, removed, or dyeth, the Successor shall avoid such Lease, Grant, Charge, Warranty, &c. But if a Bishop, being both Patron and Ordinary, doth Confirm a Lease made by the Parson without the Dean and Chapter, and after the Parson dyeth and the Bishop Col-

lates another to the Benefice, and is afterwards deposed, translated, or dyeth, yet the Confirmation of that is, and stands good, because there the Revenues which are to maintain the Successor, are not thereby diminished.

Vid. Pasch. 1 Car. 1. The Bishop of *Chichester* and *Freelands Case*, *Bridge-man*, p. 29. The Bishop seised in Fee of a Park, to which the Office of a Keeper did belong, with the Fee of 5 l. and a Livery; The Bishop granted the said Office with the Fees, *nec non cum pastura pro duobus equis in eodem parco*, which grant was confirmed by the Dean and Chapter: Resolved in this case, That although the grant of the said Pasture was void, yet it should not prejudice the grant of the said Office with the ancient Fee; for they shall be taken to be several and distinct grants, and the grant of the Office with the ancient Fee is good to bind the Successor: For although they are contained in one deed, yet they are several and distinct, and the one may be good, the other void.

If a Parson, &c. bringeth a Writ of *Juris utrum* for any thing which concerneth the Church, and the Defendant pleads in barr the Warranty of his Predecessor or Ancestor, the Plaintiff shall not be barred by such Warranty, for

Cook 1. part.
Justit. 370.

a:

that the Parson demandeth the thing in the right of his Church, and in his po-
 litick Capacity: And so it is if the Par-
 son bringeth an Assize; although that
 thereby he recovereth the Land, and he
 himself is to take the profits to his own
 use; yet because after the Recovery,
 he is seized of the Freehold whereof the
 Assize was brought in the Right of the
 Church, a Warranty of his Predecessor
 or Ancestor pleaded in Barr shall not
 barr him. The like Law is of an Arch-
 deacon, Prebend, Vicar, &c. for the
 possessions concerning their Arch-
 deaconry, Prebendary, or Vicarage,
 they shall not be barred by any War-
 ranty of their Predecessors or Ance-
 stors.

If there be Lord Mesne Prior and
 Tenant, the Mesne cannot be fore-jud-
 ged in a Writ of Mesne within the Stat.
 of Westm. 2. Cap. 9. because he cannot
 do any thing to the prejudice of his
 house, or Church: and so is the Law of
 a Bishop, Parson, Vicar, &c.

A Prebendary, Parson, Vicar, &c.
 for the benefit of their Churches, shall
 be esteemed to have the Fee-simple of
 the Gleab Lands in them; For they
 shall have and maintain an Action of
 Waste for Waste committed in the Gleab,
 and in the Writ it shall be said, that the
 Waste is *ad Exbaredationem Ecclesie*: but
 a Parson, Prebendary, Vicar, &c. can-

V. This difference, 11 E. 3.
8 H. 5. 10. 2 H. 4.
2. 38 H. 8. br.
Leases 18 Hill.
33 Jac. Mande
and Frenches
Case, Bridgeman
94. acc.

Cook 3. part. 65.
in Pennants
case.

not discontinue the Fee of the Gleab ;
And if they make Leases for years,
reserving Rent and dye, their Leases
are now void by their deaths, and no
acceptance of Rent by their Successors
shall make such void Leases to
be good ; Otherwise it is, if they
make Leases for lives ; there the acceptance
of the Rent by the Successor will make
such Leases good, because the Leases
were not void, but voidable only : But
if a Bishop, Abbot, Prior, &c. make Leases
for years and dye, and the Successors do
accept of the Rent, they shall never avoid
the Lease, for that the Leases were not
void, but voidable. But all Leases made
by them at this day must be with and
under the Provisoos and Limitations in
the precedent Chapter before mentioned ;
otherwise the Leases will not be good.

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CAP. VI.

Of Advowsons in general; The Original of them: How they first began, and who were the first Founders of them. And in whom the Patronage of all Advowsons was first settled.

I Do not find that in, or by any Record which I could yet see, nor is it mentioned in any of the books of Terms, or in any other books of the Common Law of *England*, when Advowsons had their first Original within these Islands of *England*, *Scotland* and *Ireland*: But this I do conceive, that in the Saxons times, after the first Division of the Realm of *England* into Parts or Counties, and after the conferring of great Lordships, Mannors and Lands to the Lords, Peers, and great persons of the Realm, and others; and after Seignories were first erected and established within the said Realms; and after the first planting of the Christian Faith within these Islands of *England*, *Scotland*, and *Ireland*. It is most certain, that Christian Religion was planted here, soon after our Saviours Passion,

and in the time of the British Kings. Vide *Spelman de Co. Tom. 1. c. de Exordio Christiane Religionis in Britannia. Usher de Britannicarum Ecclesiarum primordiis*, and Bishop Goodwin Catal. of Bishops, (which I do not find to have been before the Saxons taking of the Government of these Nations) I do conceive, that then, and not before, that the Kings of these Islands did first begin to erect Cathedral Churches, Create Bishopricks, erect Monasteries, Abbies and Priories, and other Religious houses for the receiving into them of such persons as professed the Christian Faith: and that afterwards in imitation of the said Kings, particular Lords of great Seigniories, Lordships and Lands, and other persons of Ability did upon parcel of their Demesne Lands build and erect particular Churches, and endowed them with sundry parcels of Lands, and with other profits and immunities for the better maintenance of such persons as took upon them the publishing and defence of the Christian Faith, reserving unto the several Founders of the said Monasteries, Priories and Churches, a Right and power to confer and bestow the said Abbies, Priories, Churches and Lands, and other things to them annexed, and with which they were endowed, unto such persons as they should think fit to confer

V. 38. Aff. 22. 6.
H. 7. 14. 24 E. 3.
72.
V. Mr. Se'den
Hist. of Tyber,
cap. 9. & 12.
V. H. 18. Eliz.
Anderson 2 pt.
50. in Cornwallis
& Halls Case.
By the Creation of Recto-
ries and Vicca-
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sons had their
beginning and
not before.

confer the same upon, to be to them and their Successors for ever: And hence it was, that it was said by *Parving* in 7 Ed. 3. Fitz. title *Quare Impedit* 19. That by the Grant of the Church, the Advowson thereof did pass: and that there also *Herle* Justice said, That long a man did not know what Advowson was, but when he would give the Advowson, he only said, that he gave the Church: And for the word (Advowson) I find in 30 E. 3. 21. Fitz. tit. *Quare Imp.* 5. That the same is not appropriated to a Church only, but to other Ecclesiastical Foundations, as namely to a Priory, or others: For I find, that *John de Boys* brought a *Quare Impedit* against the Bishop of *London*, and counted, that he was seized of the Priory of *W.* to which the Bishop had disturbed him to present, and therewith agreed divers others of our old year books, as 24 E. 3. Qu. Imp. 27. 6 E. 3. Qu. Imp. 38. and 11 E. 3. Qu. Imp. 107.

7 E. 3. tit. *Quare Imp.* 19.
V. 20 E. 4. 11. If an Advowson be appropriated to an Abby, and the Abby be afterwards dissolved, The Donor shall have the Advowson, and if the Church be void, and he be disturbed, he shall have a *Quare Imp.*
30 E. 3. *Quare Imp.* 5.

24 E. 3. *Quare Imp.* 27.
6 E. 3. *Quare Imp.* 38.
11 E. 3. *Quare Imp.* 107.

An Advowson then in general, is a Right of Presentation, which the Founder of any Monastery, Abby, Priory, Church, Chappel, hath reserved unto himself, his Heirs, or Successors upon the Foundation thereof, to confer or bestow the same so often as the same shall happen to be vacant, or become void, to, and upon any person or persons, who is, or are capable to receive the

the same; and fitly may be applied unto any thing of which a man may have a *Quare Impedit* if he be disturbed in the Donation of, or Presentation to the same: as appeareth by these books and Authorities following; that is to say, if he be disturbed in his Presentation to an Abby 22 H. 6. 25. 25 E. 3. Qu. Imp. 16. 10. E. 3. 32. 29 E. 3. Qu. Imp. 151. 11 H. R. 2. Fitz. tit. Brief. 643. 29 E. 3. Qu. Imp. 190. To a Prebend, 7 E. 3. Qu. Imp. 21. 31. E. 3. Qu. Imp. 165. 13. R. 2 tit. Brief. 163. To a Vicarige, 5 E. 3. tit. Qu. Imp. To a Priory, 17 E. 3. Qu. Imp. 70. To a Deanery, 21 & 29. E. 3. Qu. Imp. 26 & 18. To a Chappel, 17 E. 3. 13. And Fitz. Na. Bre- vium 33. To a Chauntry which is Dona- tive.

V. Fr. 31 Eliz. 2n
Co. B. in Smal-
man and Bishop
of Coventries
Case. *Qu. Im-
pede* lycen
of an Archdea-
conary.

Bracton lib 4.
240. Cook 1 pt.
Institur. 17.

V. Br. tit. A.
of the King. acc.

Advowson is called by some Patro- nage, or a Right of presenting to the Church: Cowell in his title *Patronus* saith, *Jus Patronatus est jus presentandi Clericum ad Ecclesiam vacantem ex parte ei Concessum, qui Consentiente Episcopo vel instruxit, vel dotavit Ecclesiam.* And Bra- cton, *Advocatus est, ad quem pertinet jus Advocationis, ut ad Ecclesiam Nomine pro- prio, non alieno possit presentare.* They who were Patrons were sometimes cal- led *Advocati*: because as Advocates do defend the Causes of their Clients, so the Patrons did take upon them to pro- tect and defend their Churches and their

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their Presentees thereunto, against all usurpers of the same. And hence it is that they were sometimes called *Patroni à Patrocinio*, from defence. For being the first Founders of the Church, and endowing them with Lands, Livings, and other immunities, priviledges and things, there was reserved to them, their Heirs and Successors (as before is said) the full and only power of disposing of the said Churches upon all Avoidances of the same, and of the providing of a Competent and fitting Incumbent for the same; and therefore saith a Learned Civilian, *Tenetur Patronus protegere Ecclesiam, & reparare si minuetur ruinam, & de bono Sacerdote providere.*

V. in Sary and Pigeon Case, Foph. 171. A Patronage was gained. ratorne fundi, Fundationis, vel dotationis p. Dods.

The Right of Presentation, or of Patronage is a real right fixed in the Patron or Founder of the Church and his Heirs or Successors for ever: and is the same and the like, which Founders of Abbies, Priories and Monasteries have, or had to their Abbies and Priories. And the Patrons of Advowsons of Churches have and ever had as absolute property and Ownership in and to their said Churches, as any other man had or hath to any other his Lands, Tenements and Hereditaments whatsoever as appeareth by several of our Book Cases, viz. 8. Aff. 29. 13. Aff. 22. 11 H. 4. 64. I shall cite but two Cases

12 H. 6. 28. by Portington acc.

9 E. 3. 2. Imp.
82.

ses more to prove the same. Pasch. 9 E. 3. Quare Impedit. 30. A. was Patron of the Priory of *Spalding*, and by Deed Indented between A. the Patron, and B. the Prior, it was covenanted, That at every Avoidance of the Priory, That they should not have anything in the Priory, but only for to chooise their Prior, to be maintained out of the Priory, saving unto A. the Patron and his Heirs all Presentations to Churches which should fall void: In a Quare Impedit brought against the Sub-Prior and Covent by A. the Patron, for a Presentation to a Church annexed to the Priory which became void, it was adjudged, that by the saving, the Advowson of the said Church did remain to A. the Patron and his heirs; and upon the acknowledgment of the Deed aforesaid A. had a Writ to the Bishop to admit his Clerk to the said Church.

38 Aff. pl. 22.

38. Aff. p. 22. The Prior of *Plympton* Case, that the King founded the Chappel of P. and endowed the same with two Hides of Land: The King was the Patron. And although afterwards the Chappel and Lands came to the hands of a Prior, which Priory (after the gift) was founded by the Bishop, and the King after the Foundation of the said Priory, did grant to the Prior and Covent *quod transferre & tenere possint*

Cap. V.
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fiut Ecclesiam, and did also grant the two Hides of Lands *Canonicis quos Episcopus posuit*: Yet in that Case, because the King by his Charter doth not grant the Patronage by exprefs words, It was adjudged, That the King remained Patron. And although the Prior after the Foundation had presented time out of mind to the Chappel, yet it was adjudged, that the same did not take away the Kings title of Patronage.

CAP. VII.

That the Right of Patrons to Present to Advowsons of Churches, is a Temporal, and not a Spiritual Inheritance.

THe Right of Patronage, or of Patrons to Present to Churches and other Ecclesiastical Dignities and Promotions, being the same with the Right of Founders, as by the books of 8 E. 3. & 13. Ass. is said: and the Common Law having reserved the power of Con-
ferring of Benefices upon the Avoydances of the Churches by Death, Relinquation, or otherwise, to the Patrons and their heirs: It is now to be seen by what authorities and reasons, collected out of the books of the Common Law, this
Right

Right of Presentment is proved to be a Temporal Inheritance in the Patron and his heirs, and not an Inheritance which is Ecclesiastical.

I shall set forth, shortly, some reasons, and back them with authorities of Law. First, It is proved to be a Temporal Inheritance, because an Advowson, or the right of the Patron to Present may be Appendant unto, and is parcel of a Mannor many times which is a Temporal Inheritance, as it is said in 5 H. 7. 37. b. And the Appendant must be of the same nature and condition as the Principal is. 1. When a Mannor was first created, and Land parcel thereof was given to build or erect a Church upon it, the Advowson of that Church became Appendant to the Mannor, which was a Temporal thing; and therefore it hath been holden, That by the Grant of the Mannor, *cum pertinentiis*, that the Advowson of the Church passed thereby.

In 33 H. 6. 33. if a man be disseised of a Mannor unto which an Advowson is Appendant, and the Church becomes void; and the Disseisee doth after enter into the Mannor, the said entry shall vest the Advowson again on the Disseisee; because the Advowson is parcel of and Appendant to the said Mannor; and therewith agree the Books of 9 E. 4. 39. and 19 H. 6. 33.

5 H. 7. 37. b.

13 E. 3. 2. Imp.

58. 41 E. 3. 36.

45 E. 3. 12. Cook

1 pt. l. 111. 121.

122. acc.

33 H. 6. 33.

M'ch. 14 Eliz. in
Co. B. Leon. 3.
pg. 18.

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In Cook 10. part in *Whistlers Case*. Cook 10 part, Whistlers Case.
If the King be seized of the Mannor of D. to which the Advowson is Appendant, and Leaseth the Mannor to I. S. for years, excepting the Advowson, and afterwards the King by his Letters Patents grants *totum illud Manerium de D. cum pertinentiis* to I. D. in Fee, *exceptis qua in eisdem Litteris Patentibus excipiuntur. Et ulterius, grants Manerium prædict. & omnia & singula præmissa cum pertinentiis adeo plane & integre & in tam amplis modo & forma prout præmissa ad manus nostras devenerant* : It was adjudged in that Case, That by the Grant of the Mannor without making mention of the Advowson, that the Advowson passed, because it was parcel of and appendant to the Mannor : But if the Advowson had been severed from the Mannor and been in gross, that by the Grant of the Mannor, the Advowson had not passed without special words of the Advowson in the Grant ; Nomore then it did in the Case in 38 H. 6. 26. the Abbot of *Syons Case* ; where the Case was, That the King was seized of the Mannor of D to which an Advowson was Appendant, in the right of his Crown ; and by his Letters Patents Leased the said Mannor, (amongst other things) to A. and B. his Wife for the Term of their lives, and afterwards the King reciting the said Lease, for the lives of A. and B. granted

ted *Manerium pradietum* which A. and B. held for their lives, unto C. D. and E. and their heirs. It was holden in that Case, that because the Advowson was not mentioned in the Grant, but in the *Habendum* only, That the Advowson did not pass by the Letters Patents to the said C. D. and E. because the said Advowson remained in the King as in gross, and was not mentioned in the Grant, but in the *Habendum* only. But if the Advowson had been before in the words of the Grant, before the *Habendum*, then the Advowson had passed unto them.

M. 14 Jac. The Chancellor and Scholars of *Oxford* and Walgraves Case. Moor 872. Which Advowson was append. being a Recusant convict: the M. was seised into the Queens hands; who granted the same with the appurtenances; but Advowsons were not mention'd in the grant. Resolved, The Advowson did not pass by the word Appurtenances, without mention of Advowson, or words *adeo plene, & integre & in tam amplis modo & forma*, as the Recusant had them.

Secondly, An Advowson is a Temporal Inheritance, because it lieth in Tenure, and may be holden either of the King *in Capite*, as the Book of 12 H. 7. 19. is; or of a common person, by 21 E. 3. 5. where a *Quare Impedit*

12 H. 7. 19.

21 E. 3. 5.

32 H. 6. 24.

24 E. 3. 60.

5 H. 7. 36.

Impedit was brought against the Abbot of *Welbeck*, and the Plaintiff there counted, That the said Abbot held the said Advowson of him by Homage, Fealty and Escuage.

Note M. 37 Eliz
B. R. Cro. 1. pt.
Sir Ed. Cleer,
and Peacocks
Case. Resolved,
That the Devise
of Advowson
was good, and
that it was de-
visable within
the Statute of
Wills.

33 H. 6. 34. b. in a Writ of Annuity brought by the Prior of *Castleacre*, against the Prior of *Bentley*, the Defendant pleaded, That he was seised of the Advowson of *Aspall* in the County of *Sussex*, *ut de feudo & jure Monasterii sui de Bentley*, and that he held the Advowson of the Prior of *Castleacre* by the service of Fealty, and 2. s. 8. d. per an. And it was there agreed, That an Advowson doth lye in Tenure, and that the Lord might distrain in the Gleab Lands for the Rents and Services, the Cattle of the Patron, if he found any upon the Lands, but not the Cattle of a stranger.

v. 29 Eliz. in
Co. B. in the
Queen and Scots
Case

In 22 E. 3. 3. a Writ of *Cessavit* was brought against *John de Gremesley* Parson of the Church, where the Tenant demanded the View, and he was ousted of the View, because it was of his own Cesser; and afterwards he prayed in Aid of the Patron and Ordinary, and the Aid was granted him.

22 E. 3.

24. E. 3. 46. a. in a Writ of Right of Advowson, it is said, That the Tenant shall be summoned in the Gleab of the Church: And so it is in a *Quare*

24 E. 3. 46. a.

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Impeâit

V. 11. H. 6. 4. acc.
Quare: for there
 it is said in a

Imp. brought
 against the Pa-
 tron, The sum-
 mons shall not
 be in the Church;
 because he hath
 nothing in the
 Church, but is
 only to have
 the presentment.
 V. Br. *Pracipe*
Quod reddat,
 15. 15 H. 7. 38.
 acc.

19 E. 3. *Quare*
Imp. 154.
 7 E. 3. 66.
 9 H. 7. 5.
 5 E. 4. 7.

Cook 1. part,
 Institut. 164.
 34 H. 6. 40.

V. M. 33 Eliz. C. B. Sir John Argente
 and Bishop of Gloucesters Case: An
 Advowson append, to a Mannor may be
 extended upon a franchise, and if the
 Church void the Court, may present
 Owen 46.
 5 H. 7. 37. 32 H. 6. 150

Impedit; the Summons must be in the
 Church; and to conclude this reason,
 The Writ of Right of Advowson it self
 doth suppose a Tenure; for the words
 of the Writ are, *Quod clamat senore*, as
 the Book of 15 H. 8. is by all the Justi-
 ces.

Thirdly, That an Advowson is a Tem-
 poral Inheritance, it appeareth in this,
 that a *Pracipe quod reddat* lyeth thereof,
 as the Book 20 E. 4. 15. 15. That the
 wife may be endowed thereof, as the
 Book of 19 E. 3. *Fitz.* 111. *Quare Impedit*,
 154. is; That the Husband may be Ten-
 nant by the Curtesie thereof, as 7 E. 3.
 66. 3. H. 7. 5. and 5 E. 4. 7. is: That it
 may be forfeited and lost by Attainder,
 Usurpation, Recusancy, Outlawry, as
 the Books of 9 H. 6. 57. and Cook 10.
 part 55. are. That it may be divided
 betwixt Parceners either by word or
 writing, as Cook 1. part, Institut. 164.
 13 E. 2. *Quare Impedit*, 170. 5 H. 7. 8.
 and 34 H. 6. 40. are, That it may be gi-
 ven in Exchange for other Temporal
 Inheritances, as 11 H. 4. 54. 15. That
 it is valuable, and shall

be Assets in a *Forme-
 don*, as the Books of
 5 H. 7. 37. 32 H. 6.
 25. and 33 H. 6. title
 garrantry 33. are. That
 by the Grant of all
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Cap. VII.

Parsons Law.

51

Lands and Tenements,
an Advowson will
pass, as is said in 11.
H. 6. 4. by *Martyn*.
And although it pas-
seth not by Livery and
Seisin, (although that
some Books are that it
may pass by Livery of
the ring of the Church
door, as the Books of
43 E. 3. 1. and 6 H. 7. 3.

by *Townsend* are:) Yet by Deed it is
grantable ever, as all other Inheritan-
ces are, and the delivery of the Deed
of Grant of it, shall stand in the place
of Livery made of the Church it self :
as it is said by *Cook* in the first part of
his Institutes, 46. & 335. And *uid* 49.
E. 3. 60. 6 H. 7. 14. That in ancient
times the Patrons upon Vacancy con-
ferred the Church unto and upon the
Incumbents, without Admission, Insti-
tution, and Induction, by these words
only, *Aecipe Ecclesiam*, which was cal-
led the Patrons committing of the
Church to the Incumbent.

V. M. 32 Eliz. C. B. the *Green* and
Fanes Case, Leon. 1. pt. 201. where the
Church is void by the grant of *omnia bona*
& *catalla*, the presentment will not pass,
because a chattel and a thing in
action.

11 H. 6. 4. by *Martyn*.

V. Hill. 13 Jac. Mande and Frenches
Case, *Briggman* 21.

21 H. 6. 4. 43 E. 3. 5. 41 E. 3. 2. 6 H. 7. 3.
20 E. 4. 4 & 5.

Mich. 34 Eliz. in
C. B. Sir E. Cleeves
Case, Owen 24.
The Devise of an
Advowson in
gross is good.
M. 37. Eliz. Cro.
3. pt. 399. acc.
Cook 1. part.
Institur. 46.
18 E. 3. 16. by
Shard : It was
never heard, the
one could enter
into an Advow-
son granted. No-
thing can be
made of it; the
reason is, be-
cause nothing
can pass by L.

vey, but that whereof possession may be taken by the Feoffee or Donor
and given to the Feoffee or Donor.

C AP. VII.

Of Advowsons, Appendants, and in Gross; To what they may be Appendant, and by what and whose Acts they may be severed and made Disappendant.

5 H. 7. 9.

V. 13. Eliz.
Dyer 299.

10 H. 7. 15. by
Fineux.

Vid. 19 H. 7.
15. by Fineux.
acc.

MR. Littleton in his Chapter of Villenage saith, That Advowsons are either Appendants or in Gross; and in 5 H. 7. 9. it is said, That Appendency is evermore, or for the most part by Prescription; and therefore *vid.* 13 Eliz. in Dyer 299. If a man brings a *Quare Impedit* for disturbing him to present to an Advowson appendant to his Mannor, he needs not in his Count for to shew how it became Appendant, or how the Plaintiffs turn doth commence to present: For that the Advowson being Appendant, and he having title to the Mannor, it is apparent that the same Appendency is by Prescription, and doth pass with the Mannor or Lands unto which it is Appendant, unless that it be severed from the Mannor by Grant by Deed, or by a Partition, or some other Legal act.

But yet note, That Prescription cannot

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not make a thing to be Appendant, or Appurtenant, unless the thing Appendant or Appurtenant doth agree in quality and nature unto the thing unto which they are Appendant or Appurtenant. *Vid. Plow. Com. 168. and Cook 1. part Instit. 122, acc.*

In 1 H. 7. 24. b. in an action of Trespass where the Defendant claimed to have *Liberam faldam*, there it is said, He must shew, that the same is Appendant to some Land; for *Libera faldam* is nothing else but the Lord to have the sheep of his Tenant to fold upon his Land in the night time, for the better manuring of his Lands, which thing cannot be in Gross, but always is by reason of Lands, as it was said by *Keble*, and agreed by the whole Court:

In 5 E. 6. *Dyer* 70. 8 H. 7. 4 & 5. and in *Cook* 1. part, Institut. 122. Those things which are Appendant, must be Appendant to things which are of a Superior Nature, and which may have a perpetual subsistence and continuance; and therefore it is there agreed, That an Adyowson cannot be appendant unto Rents or Services which may be extinguished or discharged, and therewith agreeth *Cook* 4. *Terringham's* Case for a Common appendant, which is of Common Right, and must be appendant unto arable Lands which may have a continual and perpetual subsistence forever.

E 3

In

5 E. 6.
Dyer. 70.
8 H. 7. 4. & 5.

M. 29 Eliz. 2. R.
Long's Case.
Leon. 3. pr. 19.

Plow. Com.
169, 170.

V M. 13. Eliz. in
Com. B. Long
and Hemings
Case; To a
M. in Repurari.
on, Advowson
may be Appen-
dant.

In Plow. Com. 169, & 170. Things which are Incorporeal, cannot be Appendants, Fairs, Services, or other Inheritances, which are Incorporeal: But an Advowson may be appendant unto the Demesnes of a Mannor, or unto Honours, Castles, or other Lands or things Corporeal which may have a Continual being, or subsistence.

An Advowson cannot properly, and in strictness of Law be said to be appendant to an house for habitation; yet in 7 E. 4. 20. in a *Quare Impedit* brought for disturbing him to present his Clark to the Church, the Defendant did plead, That one I. was seized of an House unto which the Advowson was appendant in his Demesne as of Fee, and gave the same house with the appurtenances unto the Ancestor of the Defendant in tail, &c. But I take the Law to be, That the plea there must have this Construction, That the Advowson was appendant unto the Land upon which the house was built, and not to the house *quatenus* an house of habitation only: For that by a secondary means, an Advowson may be appendant to an house, or unto another Church or Chappel.

so 7. 13. b. by
K. 12.

10 H 7. 13. b. By *Keble*, If I. be seized of an house with an Advowson appendant, and afterwards the house doth decay, and fall down, I. shall have the

the Advowson by reason of the soil, and the Advowson shall be said to be appendant to the Land upon which the house stood.

16. H. 7. 9. by *Rede*, if I. have Common Advowson, or Wreck appendant to an house which after falleth down, yet I. shall have the said appendancies, because that the soil which is the substance of that to which the appendance is, continueth.

16. H. 7. 9. by
Rede.

A man was seized of the Advowson of a Vicarige, which was appendant to the Rectory of *West Bodwin*, and was attainted of Felony, which was concealed from the Crown in the time of King E. 6. The Queen afterwards granted the Rectory, & *omnia tenementa parcell. spectant. dict. Rector.* to I. S. In that Case, it was holden, That a Vicarige might be appendant to a Rectory, and that by the grant of the Rectory by the Words aforesaid. That the Advowson of the Vicarige did pass unto the Grantee.

19. Eliz. Dyet.
359.

The Advowson of the Vicarige of Common right is appendant to the Honory. But it may be appendant to the Mannor; as first the Rectory was before the appropriation appendant to the Mannor. The Advowson of the Vicarige upon the appropriation might well be reserved to the Patron, and so it shall be appendant as the Advowson of the

Rectory was. Mich. 16 Jac. in Com. B. Sir George Shirley and Underhills Case. Moor. 894.

V. 24. E. 3. Q. Imp. 13. One Advowson may be appendant to another Advowson.

Advowson in gross is ; Where an Advowson which was appendant unto a Mannor or Lands, is, either by Grant, or by Conveyance, or Deed, or other ways severed and divided from the Mannor or Lands unto which the same was before appendant,

Pasc. 3. Car. C. B. Hartox and Cock's Case. Hutton. 88. If the King be seized of a Mannor to which an Advowson is appendant, and makes a Lease thereof for life, except the Advowson; The Advowson is in gross during the Date for life and when the Grantee dyes, it is appendant again to the Mannor.

If a man be seized of a Mannor to which an Advowson is appendant, and by Deed granteth one acre belonging to the Mannor *una cum advocatiōe Ecclesie*, and further by the same Deed giveth and granteth the same Advowson, The question in that case was, Whether the Advowson did pass as appendant to the acre, or as an Advowson in gross; and the better opinion of the Book 33. H. 8. 48. in Dyer was, That by that Grant, the Advowson was severed from the

the Mannor, and was become in gross; for notwithstanding that there was but one Deed; yet there being several Grants and Clauses in the same Deed (and every mans deed shall be taken strongest for him to whom the Grant is) and it was more beneficial for the Grantee to have the Advowson in gross then appendant to the acre of Land; It vvas holden therefore in that Case, that the Advowson did pass as in gross. But in that Case, If the whole Mannor had been granted, then the Advowson had passed as appendant and not otherwise, or in gross.

In 48. E. 3. by *Finchden*. If a man grants the Mannor of D. to yvhich an Advowson is appendant, and by the same Deed the Advowson of the Church of D. so as it is named in gross, yet it shall pass as appendant.

45. E. 3. A Fine was levied of a Mannor to which an Advowson vvas appendant, by yvhich a third part vvas rendered back to one for life vvith divers Remainders over, and so of the two other 2. Parts with the Advowson of every 3. Part as aforesaid: In that Book it vvas debated yvho should have the first avoidance, and it was holden, notwithstanding the Division aforesaid, and the naming of the one before the other, that the persons remained Tenants in Common of the Advowson, so as if they

they could not agree in their presentment, that Laps should encur to the Bishop, and there was no prerogative given to him who was first named, nor any prejudice to the last named, being by one deed, and passing as it were *uno flatu*, the Advowson did remain appendant as it was before.

14. Eliz. Dyer.
312.

In 14. Eliz. Dyer. 311. in *Cromwell* and *Andrews* Case, If a man bargains, sells, gives, grants a Mannor, and an Advowson to one, and afterwards levieth a Fine, or enrolleth the Deed, in that Case it was holden by the Lord Dyer, that the Advowson did pass by the bargain and sale as in gross before the enrolment of the Deed; But notwithstanding that opinion, I do conceive That the Advowson cannot pass, unless the Deed be enrolled, and then it shall pass as appendant, and not in gross, by reason of the intent of the parties.

In 9. Eliz. Dyer. There were two Advowsons in *Illesfield*. viz. *St. Martins* appendant to the Mannor of *Illesfield*, and *All Saints*, which was an Advowson in gross; and the Churches by the Consents of the Ordinaries and Patrons were united; and it was agreed betwixt the Parties, That the Patron of the Advowson in gross should have the first presentment, and so they should present *alternis vicibus*; In that Case,

43. E. 3 35. acc.

It

It was adjudged, That notwithstanding that, That the Advowson of the Church of St. *Martins* did still remain appendant for every second Presentation, and that the Appendancy was not destroyed thereby.

43. E. 3. 35 a. In a *Quare Impedit* the Plaintiff Counted, That H. was seized of the Mannor of F. to which an Advowson was appendant, and that one R. brought an Assize of Darrein Presentment against him: and upon a Fine afterwards levied, it was agreed betwixt them, That R. did acknowledge the same to be the right of H. For which Conusans H. granted that R. should present first, and after that A. and then R. *alternis vicibus*. H. dyed, by which the Mannor descended and came to his Daughter; and the Church became void by the Death of the Clark of R. The heir of H. presented and died, and afterwards R. dyed, and S. the heir of R. presented; the Defendant pleaded, that the daughter of H. did infeoff him of the Mannor to which the Advowson was appendant. In this Case Exception was taken to the Plaintiffs Count, because he claimed the Advowson as appendant to the Mannor of F. for by the Count it was proved, that the Advowson was in gross; for by the Composition by the Fine they ought to claim the Advowson as in gross. But it was said by *Bolkeyn*, That

That he who brought the Affize of *Darrein* Presentment did acknowledg the Advowson to be the right of the other who was seized of the Mannor, and that by his acknowledgement, that the Advowson was not of other Condition then it was before, and that by the Grants of the Presentments back again to him, that which was in his own person did remain in him in the same Condition it was before the Grant, and that was that the Advowson was appendant to the Mannor: But if he vvho was seized of the Mannor had acknowledged the Advowson to have been the right of the other, *viz.* the Conussee, then by such Conusans the Advowson had been in gross because it had been severed from the Mannor by the Conusans, and then by No grant *ex post facto* it could have been appendant again: And therefore the Count was holden to be good.

But Note, that in some Respects by Act in Law an Advowson may be at one time appendant, and at another time in gross.

If one hath a Mannor to vvhich an Advowson is appendant and grants the Advowson to one for life, and after enfeofeth him of the Mannor *cum pertinentiis*, the Freehold of the Advowson is not appendant, but if in such Case, the grantee regrant the Advowson to the grantor,

tor, the Advowson is again appendant; But if one Lease his Mannor to one for life, saving to him the Advowson: and after he grants to one the reversion of the Mannor *cum advocations*. It is clear in that case the Advowson shall not be appendant again to the Mannor.

13. E.3. Qu. Imp. 170. If a Mannor be divided betwixt Coparceners and every one hath a third part of the Mannor allotted unto them, no mention being made of the Advowson, in that Case the Advowson remains in Coparcenary and in gross, and yet in every of their Turns it is appendant to that part which they have: which appears by the Book of 45. E. 3: and Cook 1. 13. E. 3. Qu. Imp. 170. Cook 1. part, Institut. 122.

2. h. 7. 5. h. If a Mannor be divided amongst Coparceners, to which an Advowson is appendant, they are Tenants in Common of the Lands and Joynt-tenants of the Advowson and if one of them dyeth the Advowson shall fall again to the Mannor.

5. H. 7. 2. A man was seized of four Mannors to one of which, an Advowson was appendant, and had issue four daughters, and dyed; the daughters made partition of the Mannor without making of any mention of the Advowson; and the Mannor to which the Advowson was appendant, was allotted to the youngest daughter for her part.

part: Upon argument and debate by all the Serjeants and Judges, It was resolved, That the Advowson upon partition was severed and did remain in gross, and upon the Composition made that the Coparceners should present to the same in their Turns; and yet in that Case it was holden, That if all the Sisters dye but she to whom the Mannor with the Advowson appendant was allotted, That the Advowson became appendant again to that Mannor; but because upon the Partition there was an expresse exception made of the Advowson, it was holden (as before is said) That the Advowson remained in Coparcenary in gross. *V. 21. H. 6. 32. and 38. H. 6.* But *Quare*, the difference betwixt this Case, and the Case in *19. E. 3. Quare Impedit 59.* For there a *Quare Impedit* was brought, and the Plaintiff counted, that A. was seized of a Mannor to which an Advowson was appendant, and presented and dyed, and that afterwards the Mannor descended to his two daughters, who made partition of the Mannor, and that the Church was void by the death of the Clark of A. so as he having the estate of the eldest daughter ought to present, but made no mention of agreement to present by turns. *Shipwith* took exception to the Count, because the Plaintiff did suppose that the

21. H. 6. 32.

19. E. 3. *Qu.*
Imp. 59.

the Advowson vvas appendant to the Mannor, vvhetheras by the partition the Advowson did remain in gross; and the exception vvas disallowved by the Court because the Advowson did remain appendant as it vvas before; I conceive the reason of the difference betwixt this Case, and the Case of 2. H. 7. 5. to be because in this Case there vvas no particular exception of the Advowson, as in the Case of 2. H. 7. there vvas; *quod Nota.*

As all Advowsons vvhich are appendants unto Mannors or Lands, may be severed, and divided from the Mannors or Lands by lavvful deeds of grant and Conveyance, and also by exception made become Disappendant and in gross: So likewise may they be severed and divided by tortions and unlawful acts, such as are Discontinuances of the Mannors or Lands, to vvhich they vvere appendants: by Disseisins and Usurpations; In some of vvhich Cases the lavvful Patrons, (if the Church do become void) shall not present unto the Church untill they have recontinued, or entred into the Mannors or Lands; and in other Cases they may present to the same avoidances before any Entry made, or Recontinuance of the Mannors or Lands.

In 3. H. 4. 8. If a man be seized of a Mannor to vvhich an Advowson is ap-

22. E. 4. 2. By Fairfax. If a Man present to an Advowson as in gross, where, as it is appendant to the Mannor; the very Presentment makes a disappendancy of it,

appendant, if he be Disseized of the Mannor, and then the Church doth become void, he may present unto the avoidance before his entry into the Mannor or Lands, because by the entry the possession of the Disseissor of the Mannor is defeated; and so every estate vvhich he hath made of the Advovvson vvhich vvas appendant to the Mannor is also defeated by *Tirwit*; and therewith agreeth the Book of 9. E. 4. 39. by *Brian*, vvho held, that if a man be disseized of a Mannor to vvhich an Advovvson is appendant, and aftervvards the Church becomes void, he may present unto the avoidance before his entry into the Mannor, and notwithstanding that the Disseissor be seized of the Mannor: For the Advovvson is severable from the Mannor, and therefore he may present unto the Advovvson notwithstanding that he hath not the Mannor or Lands to which the Advovvson is appendant, *V. 21. H. 6. 19. 32. H. 6. 33. and 14. H. 6. 16. acc.* But if the Disseisee dyeth seized of the Mannor, and then the Church becomes void, in such Case the Disseisee shall not present unto the avoidance before he hath entered into the Mannor. For it is holden for a Rule in *Lávy*, that a man shall never be admitted to the accessary or appendant vvhere he hath no right unto the principal, and his right in that Case,

9. E. 4. 39. by

Brian.

2. h. 7. 2 33. h. 6.

33. 21. h. 6. 19. 14.
h. 6. 16. acc.

Case is bound by the Dissent: See to that purpose Cook 1. part. Institut. 349. Where it is said, that the issue in tail shall not be remitted to Inheritances regardant, appendant; or appurtenant upon a discontinuance made of them, before he hath recontinued the Mannor or thing to which they were appendant, appurtenant, or regardant: But if a man be remitted to the principal, he shall be remitted unto the accessories.

In 17 E. 3. 3. & 13. in *Greenvill* and 17 E. 3. 3. & 13. *Rayles* Case it was holden, that if Husband and Wife be seized of a Mannor unto which an Advowson is appendant in the right of the Wife, and they present, and afterwards the Husband alieneth one acre of the Land with the Advowson to I. S. in Fee, the Church doth become void, and I. S. doth present, and afterwards dyeth, and his heir doth enter into the acre, and then the Church doth become void again; That the Wife shall not present untill she hath recontinued the Land by her *Chui viva*, because the Advowson was appendant to the acre: But if the Advowson had been severed from the acre and been in gross, as if I. S. or his heirs had aliened the acre, except the Advowson, which made it in gross, and then the Husband had died, and the Church had become void, then the Wife might

F have

Stat. 22. H. 8.
cap. 28.

have presented to the same avoidance ; and if she had been disturbed, she might have had a *Quare Impedit*. But *Quere* of that Case ; For that now by the Statute of 32 H. 8. cap. 28. The Wife may present before she recontinueth the Lands, because no alienation of the Husband shall be prejudicial to the Wife.

Husband and Wife make a Feoffement of the Mannor of the Wife, to which an Advowson is appendant. The Feoffee makes a Feoffement of one acre with the Advowson, the Husband dyes, the Wife recontinues the Mannor, and presents to the Advowson before she recontinues the acre. If the Presentment was good, was the question.

8. R. 2. Q. 1.
Imp. 199.

In 8 R. 2. *Quare Impedit*. 199. A *Quare Impedit* was brought, and the Plaintiff Counted, That I. S. was seized of an Acre of Land to which an Advowson was appendant, and presented one B. who was admitted, Instituted and Inducted ; and that afterwards I. S. gave the acre of Land with the Advowson to the Plaintiff, and that the Defendant did usurp upon the Plaintiff by presenting of one F. to the Church which was void, and that the Plaintiff entered into the acre, and that the Church then became void again ; The Defendant made a title to the Land before the Plaintiff had any thing therein, and traversed

traversed the Disseisin and Usurpation alledged; In that Case, It was holden by the Court, That because the Plaintiff who was disseized, had entered into the Mannor of which he was disseized, that the Advowson was re-continued again in him which was severed by the Usurpation, and that he might present.

M. 18. Eliz, in Com. B. Leon. 3. pt. 61. The King seized of a Mannor to which an Advowson is appendant, grants the Mannor with all Advowsons appendants to B, after a presentment by a Stranger by Usurpation: Resolved that the Advowson remains alwayes appendant, notwithstanding the Usurpation, and in a Qu. Imp. brought by the Grantee of the King he shall make title by the Presentment of the King without mentioning of the Usurpation.

19. H. 6. 30. In a Qu. Imp. the Plaintiff counted, that his grandfather was seized of a Mannor to which an Advowson was appendant in tail; and aliened two parts of the Mannor with the Advowson in Fee, and that afterwards the Alienee granted the Advowson to a stranger, and that his Father brought a *Formedon* of the two parts, and recontinued the Land; and exception was taken to the Count by *Yelverton*, because the Plaintiff did not shew the Deed of Grant, nor pleaded the same; But the

Exception was disallowed by the Court, because the Plaintiff claimed in *per formam doni*. Another Exception was taken to the Count, for that the Count was *jus duarum partium Manorii, &c. & advocatio predict.* did descend to him; and that could not be; for it could not be that the Advowson did descend to him in possession; for that the two parts of the Mannor to which the Advowson was appendant, came to him as heir to his Mother; and that the Father had aliened as aforesaid, and that after his alienation he presented in the right of his Wife, which was a remitter unto the Wife as to the Advowson; wherefore the Plaintiff mended his Count, viz.

Quod jus duarum partium & advocacionis predict. did descend; In which Case it was agreed, that by the bringing of the Formedon the Land was recontinued in the issue in tail, and so the Advowson reverted again in him, and appendant again to the two parts of the Mannor, which was severed by the Grant and Usurpation aforesaid.

14. H. 6. 16; 2.

14. H. 6. 16. a. It is agreed by the whole Court, That if a man be seized of an Advowson appendant; and is disseized of the Mannor to which the Advowson is appendant: and the Disseisor presents, and afterwards the Disseisee doth enter upon the Disseisor, and then the Church doth become void again, and the

the Disseisor doth disturb him to present that he shall have a *Quare Imp.* against him: But otherwise it is of an Advowson in gross, that he hath no remedy but a Writ of Right: So note the difference; and the reason is, because vvhhen he entreth into the Mannor to vvhich the Advowson is appendant, the possession of the Disseisor is utterly defeated: and therevwith agreeth 24. H. 8. Dyer. 4. vvhhere it is said that the Disseisee of a mannor to vvhich an Advowson is appendant, cannot present after a Discent, till he hath recontinued the Mannor to vvhich the Advowson is appendant; but before a Discent his entry is Congeable, and therevwith agree the Books before cited, viz. 5. H. 7. 35. Cook 3. part, the Marques of *Winchesters* Case. Cook 1. part, Institut. 661.

5. H. 7. 35. Cook
3. part, Marques
of *Winchesters*,
Case.

Cook 1. part, Institut, 363. b. If the Patron of an Advowson be Outlawed, and the Church doth become void, and a stranger doth usurp, and presenteth his Clerk to the avoidance; and the six moneths do pass, and afterwards the King being entituled to the avoydance by reason of the Outlawry brings a *Quare Impedit* against the Incom-
bent vvhho is in by vvrong, and removes him; By this means, the Advowson is recontinued again to the Rightful Patron, of vvhich he vvas Oulted by the

Cook 1. part,
Institut, 363.

Usurpation; and if he doth reverse the Outlavvry, and the Church doth become void again, he shall present.

In 18. Eliz. in the Common Pleas, it vvas adjudged, That if a man have three avoidances granted unto him of one Church at one time, and by one Deed; and the Church doth become void, and the Grantor usurps upon his Grantee, and presents his Clerk to the Bishop, vvho is admitted, Instituted, and Inducted; and aftervvards the Church doth become void again, The Grantee shall present to the second avoidance, because the first presentation made by the Grantor, did not put the Grantee out of possession of all the avoidances.

CAP. IX.

Of the Incidents to an Advowson: And first of Presentation, And the difference betwixt Presentation, Nomination and Collation.

HAVING in the former Chapters declared generally What Advowson is; It is requisite novv that vve take into Consideration the particular parts thereof, It is first therefore to be knowyn,

known, That Presentation is the Principal Incident and Chiefest Quality to an Advowson; Which considered in it self, is nothing else but the nomination of a fit person to the Bishop or Ordinary of the Diocess to be admitted, Instituted and Inducted unto the Church or Benefice vvhich is void.

Tr. 44. Eliz. in Grendit and Bakers Case, Yel. 7. If the Patron draws a Presentation in writing, and sets his Seal to it, and layes it in his study; and he who is nominated in it gets it, and brings it to the Bishop without the Patrons Privity, and thereupon is Instituted and Inducted by the Bishop; it is meerly void and no Presentation.

Tr. 31. Eliz. B. R. Crispes Case Cro. 3. pt. 167. The Patron writes Letters to the Father, that he hath given his Son the next Avoidance: This is not good; vvithout a Deed adjoyned.

Nomination, Presentation and Collation are *Synonima*, and commonly taken in Law for one thing, and are of one sence, as it is said, 14. H. 7. 22. by *Kingsmil*, wherewith agreeth 17. E. 3. 64. 3. and yet they are sometimes distinguished in respect of the persons; And therefore if one man hath the nomination of a Clerk to a Church or

V. Br. ti. grants
101. 2. Imp.
333. acc.

V. Flow. Com.
519.

M. 32. h. 8. Dyer
48. Co. 1. part,
in the Case of
Alron. woods 3.
h. 4. 33. 4. E. 6.
br. Case 4 to acc.
Mich. 1. Gar. B.
R. Dickenson and
Greenhows Case.
Paphan. 155.

Benefice which is void, it hath been holden adjudged in our Books, viz. 24. E. 3. 39. 1. H. 5. 1, & 2. 14. E. 42. b. 21. H. 6. 17. a. and other books, That he that hath the Nomination is the Patron of the Church, and shall maintain a *Quare Impedit* in his own Name, *presentare ad Ecclesiam*, and that which the Presentor doth, he doth but as servant to him who hath the Nomination and v. If an Abbot hath the Presentation, and another the Nomination to a Church which is void, and the Abbot surrendreth to the King; He that hath the Nomination shall have all; for the King shall not present for him, it being a thing undecent for the King to do any thing as servant to another, as it was holden by the whole Court, 1. Car. in the Kings Bench, In *Dickenson and Greenhows Case*: and v. 14. H. 4. 11. in a *Quare Impedit*, where the Writ was *Quod permittat Nominare ad Ecclesiam*, and by the opinion of the whole Court, the Writ was abated, for that there is no such form of Writ; but it ought to be, *Quod permittat Presentare ad Ecclesiam*.

Pasch. 5. Eliz. Moor 49. One hath the Nomination in Fee, and the other the Presentation in Fee, if he who hath the Nomination presents, the other shall have a Ou. Imp. against him: & sic e converso. v. Mich. 16. Jac. Sir George Sherley

Sherley and Underbills Case: Moor. 894. acc.

This Presentation, or Nomination, (call it which you will) is but in effect the offering of a Clerk unto the Bishop, or Ordinary to be by him admitted and Instituted into the Church: It is not properly in it self a Deed: but it is an Instrument in the Nature of a Letter missive, directed to the Bishop, and is but the Patrons Commendations of a Clark to be instituted into the Church: which Missive or Commendatory Letters, are usually in this or the like form, viz.

Reverendissimo in Christo Patri, & Domino, Domino W. permissione divina Eboracensi Archiepiscopo, Angliae Primati, & Metropolitano, ejusve in absentia Vicario suo in rebus spiritualibus generali. Prenobilis T. B. Baro de P. verus, & indubitatus Patronus Rectoria Ecclesia parochialis de H. salutem in Domino sempiternam: Ad Ecclesiam Parochialem de H. praedict. vestrae Diocesis modo per mortem T. R. ultimi Incumbentis ibidem vacantem, & ad meam Presentationem pleno jure spectantem, dilectum mihi in Christo T. H. Sacra Theologia Professore Paternitati vestrae Presento (or Commendo) humiliter supplicans ut praefatum T. H. ad dictam Ecclesiam admittere, ipsumque in Rectoriam ejusdem Ecclesiae institui, & iuduci facere cum suis juribus & pertinenciis universis, ceteraque omnia & singula

singula peragere & adimplere in hac parte qua ad vestrum munus Episcopale pertinere videbantur dignemini cum favore: In eujus res, &c. This Presentation, Nomination, or Commendation, may be as well by Word, as by Writing, both in the Case of the King, and of a common person.

240. 11. Jac. in
Co. B. The King
and the Bishop
of Lincoln's Case.

31. H. 6. 21, 22.
acc.

29. E. 3. 24. 1m.
acc.
Tr. 8. Jic. C. B.
The King and
the Bishop of
Chichester's Case.
Cro. 2 part. Re-
ports 247.

In 11, Jac. in the Court of Common Pleas it came in question, Whether that a Presentation made by the King unto an Advowson appendant to a Mannor parcel of his Dutchy of Lancaster under the Great Seal of England was good or not: and whether the same ought not to have been under the Seal of the Dutchy: It was Resolved in that Case by the whole Court, That the Presentation was well made; for that the Presentation was but the Kings Commendation of his Clerk to the Ordinary, and was not an Interest of the Inheritance of the Advowson; but only that it was a thing concerning the Advowson, and but as a flower fallen from the stock, which did not now participate of the Root: and also for that the King might have presented by word only. And there the Case between the King and the Bishop of Chichester. Mic. 8. in Jac. in C. B. was affirmed for Law; That where the King had an Advowson in the right of his VVard, and presented to the Avoydance under the Great Seal, that the

the same was well made, although it was not under the Seal of the Court of Wards, for that the King might present by Word only; and his Presentation was but by his Commendation of the Clerk to the Bishop to be instituted into the Church. And *Stephen Gardners* Case was then and there vouched by Cook Chief Justice, where the Presentation of *Stephen Gardner* to the Deanery of *Norwich* was good, although the King in his Presentation did mistake and misrecite the Name of the Foundation of the Deanery, because that his Presentation was but his Commendation of the Dean, and did not touch the Inheritance of the Deanery: and V. Mich. 3. Car. in the Kings Bench, *Stephens* and *Potters* Case: Cro. 1. part, Rep. 70. and 71. adjudged accordingly.

The King seized of the Advowson of a Vicarage, by reason of Wardship of the heir; The heir sued Livory; The King presented under the great Seal and afterwards without mention of the first presentment, presented another under the Seal of the Court of Wards; without notice given of the first presentment: Resolved, 1. It was a good revocation of the first. 2. It was a good presentment under the Seal of the Court of Wards. The Kings Case, Cro. 2. part acc.

Pasc.

Paic. 15. Car. in
B.R. Nelson and
Hamptons case,

Paic. 15. Car. in the Kings Bench, the Case was, A. and B. his Wife presented to a Church, to which they had no right: the Husband dyed; the Question was, Whether that the Presentation did gain any thing to the Wife. It was adjudged in that case it did not, for that the Presentation was but a Commendation, and the act of the Husband only, and it was not like an entry into Land by them.

Mic. 8. Jac. C. B.
Waters Case,

If the Lord present his Villein to the Church of D. which is void, it is no Enfranchisement or Manumission of him, as it was adjudged. Mic. 8. Jac. in the Common Pleas in *Waters Case*; and so if the Lessor present his Lessee for years to an Avoidance of a Church the same is no Surrender of his term for years, although that the Lessee doth accept of such a Presentation; for that Presentations are but Commendations, which are things revokeable, and are not of any value, and therefore they shall not be Assets to Executors: And therefore, If a Church doth become void in the time of a Bishop, and so remaineth void till his death, the King shall present to the same avoidance, and not the Executors or Administrators of the Bishop.

But 42. Eliz. in C. B. Rud against Topsey Ow. 142. In the Case of lessee for years being presented, it is holden

den by all the Justices to be an Extin-
guishment.

13. Eliz. in C. B. Mills and Whit-
woods Case. Hutton. 105. and 42. Eliz.
C.B. Sir Arthur Capels Case. If a Lessee for
20 years of an Advowson when the
Church is void takes a Presentation to
himself of the Lessor, and is admitted
and instituted: Adjudged it is a Surren-
der of his Lease.

H. 3. Car. C. B. Bains and Willobys
Case. Two Lords of a Mannor to which
a Villein is regardant, One of the Lords
licenceth the Villein to present to a
Church which is void: It was holden,
12. Jac, this was no Enfranchisement,
because it was a thing in action and this
permission of the Villein to gain the
Church to him by Usurpation is no En-
franchisement.

Thus you see, What Presentation or
Nomination considered in it self, and as
a fruit fallen, and *pro hac vice*, of what
force and estimation it is in the Eye and
Judgement of the Law: But then, if
you consider it again as a Right, it is an
hereditary Quality incident to the Ad-
vowson or Patronage of some value, es-
teem and benefit to the Patron, the same
being a Power in him to prefer and ena-
ble his friend to a Benefice, of which the
Patron, himself perhaps is not capable;
In which Presentment if he be distur-
bed, he shall have and maintain a
Writ

Writ of *Quare Impedit*, in which he shall recover his Damages, as I have said before.

CAP. X.

Who may Present to Benefices with Cure: What Persons are Capable of Presentations: And what are Causes for the Ordinary to refuse the Clerk presented; Where he must Certifie the Causes of his Refusal: and where he must give Notice thereof: where not.

HAVING in the before going Chapter set forth, what Presentation or Nomination is; It doth necessarily follow, that I briefly declare unto you, 1. Who may be Patrons to present to any Church, or Chappel, or Benefice, with Cure of Souls: 2. What persons are Capable of such Presentations what not. And for what Causes the Ordinary may refuse the Clerk presented. 3. To whom, and at what time the Presentation must be made, and to whom Lapse shall encurr for want of Presentation.

For the first, An Alien Born, shall not present to any avoydance of a Church in his own Right: But in Case that

that such Alien doth purchase an Advowson, and the Church doth become void, after Office found that he is an Alien, the King shall present; But an Infant may present in his own Name and Right; and if he doth not present within six moneths after the Church shall fall void *Latches* shall be imputed unto him.

33. E. 3. 20. Imp.
46. 8. E. 4. 4. 3. H.
6. 5. 17. E. 3. 9.
acc.
14. Eliz. in C. B.
Leon. 3. parr. 4.
acc.

If a *Feme Covert* hath title to present to a Church which is void, she cannot present by her self; but her Husband shall present; It hath been a Doubt, if the husband might present in the right of his Wife, without the Wife; But V. 28. H. 6. 8. *Quare Impedit* 85. where it is resolved, That the Presentment must be by the Husband and Wife in both their names, and not by the Husband in his right, and in the Right of his Wife.

28 H. 6. 8. 20.
Imp. 65. adjudged.

But the Wife of the King, is as a *Feme Sole*, and is as it were a person exempt from the person of the King; (although in many Cases she shall participate of the Prerogatives of the King) and is of ability of her self, either to grant or to present to any Church which is void, which doth belong unto her, without the King: And therefore in a *Quare Impedit* brought by her Plenarty upon the Presentation of another, is no Plea, nor barr against her, no more then it is in the Case of the King: V. also 31. E. 3. 32. b. where Plenarty is no good plea against the Lord, who entreteth with

V. 18. E. 3. 20. E.
3. 27. b. 31. E. 3.
2. Imp. 46. 3.
H. 7. 14. acc.

V. 18. E. 3. 32. 24.
E. 3. 35. acc.
Quere tit. Quare
Imp. 47. If Plenarty be a barr against her.
31. E. 3. 32. b.

in

in the year for an Alienation in *Mortmain*.

If a *Villein* purchaseth an Advowson, and the Church doth become void, the Lord shall present, because the Lord upon such purchase made by his *Villein*, may come and claim the Inheritance of the Advowson; and upon such Claim, the Interest of the Advowson shall be vested in the Lord; and upon the avoidance of the Church, the Lord in his own Right shall present to the avoidance.

3 E. 2. tit. Present.

10. 7. E. 3. 39. 25.

E. 3. 5. 27. E. 3.

79. acc.

The Guardian in Socage shall not present to an Avoidance of the Church in the right and name of the heir, because he cannot account for the Avoidance; For he cannot make any profit thereof; for that would be Symonie, and so make his presentment void. Neither shall the Patron in a Writ of Right of Advowson alledge Explees, or taking of the Profits in himself, but must alledge them in the Incumbent. Yet 14. E. 3. tit. Darrein Presentment 9. where it is said by *Bitry*, That he hath seen the Guardian present in the name of the heir, with which agreeth the opinion of *Green*, in 20. E. 3. Darrein Presentment. But *Quere* of it: For the Books (as I conceive) must be intended of a Guardian by Knight Service, and not of a Guardian in Socage. But See 42. E. 3. tit. *Quare Impedit* 130. where it is

7. E. 3. 63. 21.

E. 4. 1. b.

is said and agreed, that the Presentment made by the Guardian in the Name of the heir, is a good title for the heir in *Quare Impedit* brought by him. Cro. 2. p. 99 in *Sopel and Chydlers C. by Daniel Justice*: If the heir be within the age of discretion, there such a Gu. in Soc. may present.

Men Outlawed, or Excommunicate may present, and their Presentations shall stand good untill such time as they be avoided: And generally, all persons who have abilities to grant, or to purchase, have abilities for to present unto Benefices with Cure of Souls, when the Churches do become void.

Secondly, No person whatsoever is Capable to be presented unto a Benefice with Cure of souls which is void, but such a person as is *infra sacros Ordines*, or an Ordained Minister, and is also of the age of twenty three years; Nor is any Lay-person whatsoever to be presented unto any Benefice with Cure of Souls: But Spiritual and Ecclesiastical persons, (although that they be Aliens born) are Capable of Benefices with Cure within the Realm of *England*.

There was an Old Statute, That no Frenchman, although he was made a Denizen, should be presented unto any Church, or Benefice within the Realm of *England*. This Statute was made in the time of War betwixt the Realms of *England* and *France*; but that Statute is

V. St. 13. R. 2.
Rastal title,
France 1.

V. Stat. 1. H. 5.
cap. 7.

Mich. 1. Jac. Co.
B. Waters Case.

not now in force, but yet if the King doth present any one to an avoidance, contrary to an Express act of Parliament, his presentment is void, as it was adjudged, Mic. 8. Jac. in Co. B. in *Waters Case*.

Cook 1. part. In-
str. 120. 42. E. 3.
10.

A man was *Ante Natus*, born in *Scotland* before the Union of the two Realms: yet he was Capable to be presented unto a Benefice in *England* which was void, as it was adjudged, Mic. 8. Jac. in C. B. in *Doctor Seatons Case*: And so it was said it was if he was born in *Flanders*, *Spain*, or within any other Kingdom, Friend and in League with the Kingdom of *England*, he was Capable of a Benefice, or Ecclesiastical Dignity in *England*, as was the Bishop of *Spalatto*, who was preferred to the Deanery of *Winsor*, and enjoyed the same; and it was said, that such Incumbent should maintain any Action real, personal, or mixt, for any thing concerning the Gleab or the possessions of the Church, as Prior, Aliens might have done: for although he be an Alien born out of the Kings Dominions, yet he bringeth his Action not in his own right but in the right of his Church, not in his natural, but in his politick capacity, and therefore the Action will lye.

V. in *Hobarts Reports*. 147. The Arch-Bishop cannot dispense with an Alien, who neither speaks nor understands English to have a Benefice here: For it is the

Cap. X. Parsons Law.

83

the Office of the Minister to be Didacticus to teach the People in their own Language.

V. Tr. 27 Eliz. in C. B. Leon. 1. part 32. Albany and the Bishop of St. Asaphes Case.

If a Clerk be by the Patron presented to the Bishop to a Church which is void, and the Bishop doth refuse to admit or institute him to the Church or Benefice, the Bishop must shew the particular cause why he refuseth him; and he must not shew generally, That the Clerk Presented unto him is unfit, incapable, criminal, or unable to serve the Cure, but must certifie the particular inability, crime or incapacity.

V. 38. E. 3. 2. in the Earl of Arundels Case.

A. seised of the Mannor of D. to which an Advowson was Appendant, the Church became void, and A. presented I. S. to the Bishop, Ordinary of the Place, who refused to admit him into the Benefice, and thereupon A. brought a *Quare Impedit* against the Bishop, who pleaded, That upon his Examination of the said I. S. he found him to be *Schismaticum inveteratum*, and for that cause by the Laws of the Church to be *personam inhabilem & minime idoneam ad occupandum aliquod Beneficium cum cura animarum*; by reason whereof he refused for to admit him into the Benefice: In this Case it was adjudged by the whole Court of Common Pleas, and afterwards affirmed upon a

Cook 5. part. 58. Speccots Case.

Writ of Error brought in the Kings Bench, That the Plea of the Bishop was insufficient, because he shewed generally that he was *Schismaticus inveteratus*, which was altogether uncertain, and the especial crime or cause of his refusal ought to have been alledged by the Bishop, that the party might make answer thereunto, and so either Traverse the Cause, or take Issue thereupon.

9. Eliz. Dyer 254.
V. Falch 15. Car.
in B. R. Ma' sh. Re-
ports 6. This Case
of Dyer. 254. was
by Justice Batt-
ley & Justice
Jones, denied to
be Law.

In 9. Eliz. Dyer 254. The Bishop of *Norwich* refused to admit a Clark who was Presented unto him, because he was a Common haunter of Taverns, and a player at unlawful Games: And in that Case it was adjudged, That they were no sufficient causes for his refusal; for although that they were offences which were prohibited by the Laws of the Realm, as to some persons, and at certain times, and so *Mala prohibita*; yet were they not crimes which were *Mala in se*; for which only a Clark ought to be refused, or to be deprived if he were admitted. And v. 14. H. 4. 28. if the Patron Presenteth one, and the Bishop upon enquiry finds, That he hath a Plurality, that is no cause for his refusal of the Clark, because it is at the peril of the Incumbent himself if he keep the living two Moneths, that both his Benefices shall be void. But that is nothing as to the Bishop; but if the Clark Presented be Miscreant, Turk, Jew, Heretique, Schismaticque,

14. H. 4. 28.

14. H. 7. 28. 38. E.
32. 5. H. 7. 19. 11.
H. 7. 7.

Schismaticque, perjured Person, Bastard, Villein, Out-lawed, Illiterate, or a meer Lay-man, these are good causes for the Bishops refusal of him, so as the Bishop upon his refusal, did expresse the Crime or the certain cause of his refusal, by a Certificate made by him: And note, That Mich. 7. Jacobi, in the Kings Bench in *Austins* case, it was resolved by the whole Court, That whatsoever are sufficient causes of Deprivation of an Incumbent who is in the Church, the same are sufficient causes likewise for the Bishop or Ordinary, not to admit a Clark Presented to him to a Benefice. But if the Ordinary shall refuse the Clark presented unto him for any of the causes before alledged, he must give notice unto the Patron of such his cause of refusal of him, to the end that the Ordinary may present another fit Clark unto the same Church; For if no notice be given, and the six Moneths pass, the Lapse shall not run to the Bishop or Ordinary for that he shall not take advantage of his own wrong in not giving notice thereof to the Patron.

22. H. 6. 26. a. 15
H. 7. 8. 12. Eliz.
Dyer. 293. 1. H.
7. 9.

15. Eliz. Dyer 317

V. Leon. 1. part 33. *Mollineux Case.* If the Patron present, and the Ordinary doth refuse, he must give notice to the Person of the Patron thereof, if he be resident within the County; if not at the Church itself which is void.

Thirdly, The Presentation or Nomination

Plow. Com. 497.
b. in Greensons
Case acc.

7. H. 4. 3. 17. E. 3.
23. b. Fitz. N. l.
23. acc.

nation of the Clark to have the Benefice or Church which is void, must be unto the Bishop of the Diocess, who is the Supervisor, (and generally, or for the most part) is Visitor of all the Churches within his Diocess, for the better ordering and governing of the same: He is called Ordinary, because he hath Ordinary Jurisdiction in all causes which are Ecclesiastical immediate to the King, for the doing of Justice within his Diocess *in jure proprio, & non per Deputationem*: It is his care to see That the Church be provided of an able and sufficient Curate, to officiate there, *Habet enim curam Curatorum*, to see that Divine Service be said and to compell them to do it by Ecclesiastical Censures: And therefore all Presentations are made to the Bishop or Ordinary of the Diocess, where the Church is void: But in the time of the vacancy of the Bishops See, or if the Bishop be *in remotis*, about the affairs of the King or State, then the Presentation must be made to the Guardian of the Spiritualities, (which commonly is his Dean and Chapter) or to the Vicar general which supplieth the Room and place of the Bishop. And therefore *vid. 22. H. 6. 29.* by *Paston* and *Ascongh* Justices, it is said, That if a Bishop maketh a Guardian of the Spiritualities, and then goeth beyond Sea, for any the Causes aforesaid and the Patron doth present his Clark

to the Guardian of the Spiritualties, in the absence of the Bishop, and he refuseth to admit him into the Benefice or Church without Certificate of sufficient cause of such his refusal, that the Patron in such case may have and maintain a *Quare Impedit* against the said Guardian of the Spiritualties.

If a man doth recover and hath Judgment given for him, in a Writ of *Quare Impedit*, and afterwards the Bishop who is Ordinary of the Diocese, dyeth before that the Clark of the Plaintiff be admitted to the Benefice or Church, the Writ to admit the Clark of the Plaintiff must be directed unto the Guardian of the Spiritualties, *sede vacante*, to give admission: But if before the Writ of Admission to him directed be executed, another Man be Created and Consecrated Bishop of that See, the Power of the Guardian of the Spiritualties doth then cease, and the party who recovered in the *Quare Impedit*, may have another Writ unto the Bishop to admit the Clark if he please: But see 38. E. 3. 12. That if the party taketh out in such case a Writ to the Metropolitan to admit his Clark, (where it should have been to the Guardian of the Spiritualties, or to the Vicar General) he cannot afterwards waive it, and have another Writ to the Vicar General, &c. but a *Sicut alias* to the Metropolitan.

18. Eliz. Dyer
350.

38. E. 3. 12.

41. Aff. If Bastardy be upbraided, and *sede vacante* A writ issues to the Guardian of the Spiritualties; who certifies Mulier, and writes the substance of the writ in his Certificate; but doth not remand the writ with his Certificate, such a Certificate is not good, nor allowable by the Court.

As the Presentation, or the Presentment must be made unto the Bishop or Ordinary of that Diocess where the Church is void, or else unto his Guardian of the Spiritualties, or Vicar General in all cases, as before is said, so also must it be made within convenient time, to prevent a Lapse.

CAP. XI.

Within what time a Presentation must be to avoid Lapse: And where Lapse shall incur for want of Presentation within six Moneths. How the six Moneths shall be accompted; And who shall Present for Lapse.

THE Law hath appointed six Moneths to the Patron to Present his Clark unto the Bishop or Ordinary: But if the Patron doth not present his Clark accordingly, then shall the Lapse run to the Bishop or Ordinary; and he shall Present for the default of the Patron,

a Clark of his own choosing; and his Presentation is called in Law Collation. And if the Bishop or Ordinary shall surcease his time, and shall not Collate within the six Moneths to him allotted, then the Metropolitan (the Archbishop of the Province) shall Collate his Clark to the Church. And if he also doth not Collate within other six Moneths, Then shall the King as Supream Ordinary of all the Diocesses and the Benefices in *England*, Present his Clark to the Church being yet void; But there is notwithstanding great care to be had, and it is to be known, how, and after what manner the Church doth become void, for that accordingly the six Moneths shall be accompted.

Dr. and Stud.
124. acc.

If the Church shall become void by the Death of the Incumbent, then the six Moneths shall be accompted from the time of his Death; of which the Patron is at his peril to take notice, and to make his Presentment unto the Bishop or Ordinary accordingly; and so is the Law taken to be, if the Church doth become void by Creation, viz. by making the present Incumbent thereof a Bishop, or by Cession, whereof the Patron is at his peril likewise to take notice: But if the Church doth become void by Resignation (which in the act of the Incumbent himself, and which Resignation of necessity must be made to the Bishop or Ordinary)

15. E. 4. 25.
Dr. and Stud. 116.
acc. 1. h. 7. 9.
7. Eliz. Dyer. 239.

14. h. 7. 21. 3. F. N.
R. 25. H. acc.

V. 18. H. 7. 49. in
Kelloway.
5. E. 4. 3.

16. Eliz. Dyer.
327. 13. Eliz. Dyer
293. 1. H. 7. 9 50.
E. 3. 3. acc.

21. H. 6. 16. acc.

dinary) or by Deprivation, which is the act of the Law; there although the six Moneths do encur before the Patron presents, yet the Bishop or Ordinary shall not Collate, unless the Bishop or Ordinary, upon the Resignation or Deprivation had given notice unto the Patron of such avoydance of the Church: For in such and the like cases, the six Moneths shall he accompted from the time of the notice given to the Patron by the Bishop or Ordinary of the Resignation or Deprivation: But if the Church doth remain void by six Moneths after the death of the Incumbent, without any Presentation made to the same by the Patron; Or by six Moneths after such time that the Bishop or Ordinary hath in the case of Resignation or Deprivation given notice thereof unto the Patron, and the Bishop or Ordinary doth Collate his Clark by reason of the Lapse devolved unto him, and before the Clark be Inducted, the Patron doth Present his Clark to the Bishop, the Bishop may refuse to admit the Clark of the Patron to the Church; for that the title to Collate was rightfully and lawfully come to the Bishop. And note, That both for the notice, and to whom and where it is to be given; viz. that if the Patron doth Present his Clark to the Bishop and the Bishop doth refuse to admit his Clark for any of the Causes before mentioned,

That

That of such his refusal he is to give notice to the Patron himself if he be resident within the County where the Church is; but if he be not within the County, then the notice of such his refusal is to be left at the Church it self, as it was adjudged, Trinit. 27. Eliz. in C.B. *Albany* and the Bishop of St. *Asaphs* case.

V. Mollineux.
Case Leon. 1. pt.
33. acc.
V. *Albany* and
the Bishop of St.
Asaphs Case. Tr.
27. Eliz. C. B.
Leon. 1. part. Reports, sect. 9.

If the Church be void; and the Patron doth Present his Clark to the Ordinary, vvh^o refuseth to admit him until he hath examined him of his ability, and a Moneth or two after the Presentment upon Examination the Clark presented is found to be criminous, or unable to serve the Cure, and afterwards Lapse encourreth, the six Moneths shall be accomplished from the time of the Avoydance; and if the Patron be a Lay person, the Ordinary shall give notice unto him of the inability of the Clark; but otherwise it is if the Patron be a Spiritual person, and the Clark be criminous or unable.

14. H. 7. 21.

18. H. 7. 39. in
Ke loway. 5 E. 4
4.8 E. 4. 2.

If the King be Patron, and doth not present his Clark to the Church within six Moneths, there the Ordinary ought not *de jure* to Collate in regard of the said Lapse: He only ought for to sequester the profits of the Church till the King will present: But in such case, if notwithstanding the Ordinary doth Collate his Clark to the Church, and afterwards

V. 14 H. 7 21 by
Keble Br. title
Presentment, 24
Dr. and Stud.
12. 6 b. 13 E. 3 25.

Moor, 902 acc.

wards the King doth Present his Clark to the Ordinary, the King in such case shall not remove and put out the Clark Collated by the Ordinary, without a *Quare Impedit* first brought.

Hobart. 154. Lapse is not an Interest naturally (as the Patronage) but a meer Trust in Law or an Administration. It cannot be granted over, It is but a Trust to provide the Church of a Rector in the Patrons default, yet as for him, and to his use.

Catesby against
Baker and B. of
P. Yel. 100.

But in all cases before said, The six Moneths shall be accounted according to the Kalender, and not according to twenty eight dayes to the Moneth: For that the words (*Tempus semestre*) in the Statute of West. 2. cap 5. shall have such construction as shall be for the relief of him who hath right, and to give him the longest time that maybe, that he lose not his right. V. to that purpose, Cook 6. part, Catesbys case; with which agreeth 5 B. 3. Rott. 100. Memb. clause in the Tower, which see vouched in Dickenson and Greenhaws case, in Pophams Reports 137.

14 H. 7 21 per
GUTHRIE.

If the King hath title to present by Lapse, for the default of the Ordinary and Metropolitan, and notwithstanding the Kings title, the Patron doth present his Clark, who is Admitted, Instituted, and Inducted by the Metropolitan; this shall bind the King, and the King cannot remove the Incumbent without a *Quare*

Impedit

Impedit brought: For by the Induction the Church was full; and although the six Moneths were not incurred, and *Nulum tempus occurrit Regi*, yet in that case he shall not present or remove the Incumbent but by a *Quare Impedit* brought against him.

If the Queen presenteth for Lapse and the Clerk is Instituted and Inducted. If after her presentee loose this Incumbency by ill pleading; The Queen shall not again present, for that the title of the Queen is once executed, M. 32. Eliz. in C. B. Leon, 1. part 174. Arrundel and the Bishop of Gloucesters case.

If a man be Tenant by the curtesie of a Mannor to which an Advowson is Appendant, and the Church doth become void by Resignation, and then the Tenant by the curtesie dyeth, and the Mannor is seised into the Kings hand; in such case, although that the heir be now of full age, yet the King shall have the Presentment, as it was holden in 12. E. 3. *Fitz. Qu. Imp. 159.*

If the Kings Tenant be seised of an Advowson and Presents, and afterwards the Church doth become void, and the Tenant dyeth, and the King seiseth the Advowson, if the Advowson did become void in the life of the Tenant, and six Moneths pass, and the Ordinary doth not Present for Lapse in the life of the Tenant, the King shall Present; for by the

38 E. 3. 21.

the seisure he was seised, and then *Nul-
lum Tempus occurrit Regi. Vid.* to that
purpose 6 E. 2. Fitz. Presentment 9. 18.
E. 3. 21.

24 E. 3. 27. 27 E. 3.
81 acc.

A man held Lands of the King, and a
Mannor and Lands to which an Advow-
son was appendant of a common person
and dyed, and the Advowsons were sei-
sed into the Kings hands, and afterwards
the Church did become void; and after
it was found, that the Tenant was but
Tenant for life of the Advowson, and
made Livory of the Lands *cum exitibus*;
In that case it was holden by the whole
Court, That by the Livory the Advow-
son did not pass out of the King: And
in that Case the King had a Writ to
the Bishop to admit his Clerk to the
Church.

CAP. XII.

*Where the King may revoke or repeal
his Presentation, where not: And
where a Common person cannot re-
voke, or vary from his first Present-
ment.*

39 H. 6. 19. 14 E. 4.
2. 20 H. 6. 19.

IT hath been a Question much Con-
troverted in old Books, Whether, if
a Common person hath once presented
his Clerk to the Ordinary if he may re-
voke the same, or vary from his first
Present-

38. 1. 3 4. acc.

Cap. XII. Parsons Law.

95

Presentment : But the better opinion of the Books hath been, That a Common person cannot revoke, or repeal, or vary from his first Presentment, because he hath put it out of himself, and hath given to the Bishop power to perfect what was by himself begun. But if the King do present to the Church, and his Clerk be admitted and Instituted; yet the King may before Induction repeal, or revoke his first presentment, by his presentment of another Clerk to the Bishop.

But not after Induction. Dyer. 360. v. Tr. 32. Eliz in C. B. Wright and the Bishop of Norwich case. Leon. 1. part, 156. acc.

In 25 E. 3. 47. The Case was, the King brought a *Quare Impedit* against the Bishop of York of a Prebend in the Church of St. Peter in York; and shewed that the Predecessor of the Bishop presented one N. and that afterwards the Predecessor dyed, and the Temporalities of the Bishoprick came to the Kings hand, and they being in his hand, the Prebend became void by the Death of N. The Bishop said, that after the Death of N. the King presented *Robert de Kelsey* to the Prebend, who was admitted and installed by the Dean and Chapter: which Presentment of *Robert* was Ratified and Confirmed to the said *Robert*: and shewed the Deed of Confirmation thereof and shewed further that the said *Robert* dyed

V. 31 E. 3. 24.
Imp. 185 38 E. 3
35 17 Eliz. Dyer 348.
V. Bacons Maxims acc,

V. 7 E. 32, 23 E.
Dyer 360.
13 E. Dyer 293.
Cook 1 part, In-
stit. 360.

Tr 25 E. 3 47
Robert de Kelsey
Case first title
Qu. Imp. 16.

38 E. 3. 27.

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lum Tempus occurrit Regi. Vid.* to that
purpose 6 E. 2. *Fitz.* Presentment 9. 18.
E. 3. 21.

24 E. 3. 27. 27 E. 3
81 acc.

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Mannor and Lands to which an Advow-
son was appendant of a common person
and dyed, and the Advowsons were sei-
fed into the Kings hands, and afterwards
the Church did become void; and after
it was found, that the Tenant was but
Tenant for life of the Advowson, and
made Livory of the Lands *cum exitibus*;
In that case it was holden by the whole
Court, That by the Livory the Advow-
son did not pass out of the King: And
in that Case the King had a Writ to
the Bishop to admit his Clerk to the
Church.

CAP. XII.

*Where the King may revoke or repeal
his Presentation, where not: And
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voke, or vary from his first Present-
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39 H. 6. 19. 14 E. 4.
2. 20 H. 6. 19.

38 E. 3. 4. acc.

IT hath been a Question much Con-
troverted in old Books, Whether, if
a Common person hath once presented
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Present-

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V. 31 E. 3 23.
Imp. 185 38 E. 3
35 17 Eliz. Dyer
348.
V. Bacons Maxims
acc,

V. 7 E. 32, 23 E.
Dyer 360.
13 E. Dyer 293.
Cook 1 part, Inst.
360,

But not after Induction. Dyer. 360. v. Tr. 32. Eliz in C. B. Wright and the Bishop of Norwich case. Leon. 1. part, 156. acc.

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Tr 25 E. 3 47
Robert de Kelsey
Case first title
Qu. Imp. 16.

dyed Prebendary: and so demanded Judgement, if the King should have the Presentment: To which it was said for the King; That before *Robert de Kelsey* was admitted to the Prebend, the King did repeal the Presentment made of the said *Robert*; and shewed forth the Deed of Repeal, and the Certificate of the Chapter of the day thereof: It was adjudged in this Case, that by the Repeal the first presentment of *Robert de Kelsey* was utterly void, so as the King had title to present, and Judgement was given against the Bishop: Note, That I do observe out of that Case, wherewith agreeth the Book of 14. E. 3. That it must appear by Deed or other wayes to the Court, that the King did repeal his presentment: that otherwise the pleading of the repeal is not good, and to that purpose: *V. 7. H. 4. 13.* In a *Quare Impedit* brought by the King, the Incumbent pleaded the Ratification of him Incumbent under the Kings Privy Seal; To which it was answered, that the same was repealed; but it was not shewed how it was repealed by Deed or otherwise: and therefore it was not doubted if the pleading thereof was good or not: But note; that at this day it is holden, that the very presentment of another Clerk by the King before Induction, without any more signification, or Act done, is accounted in Law to be a repeal of the

14 E. 3. acc. Fitz tit.
2. imp. 5.

7 H. 4. 13.

M. 15. and 15 E.
Walers Case 1
Anderson 38.

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the first presentment.

The Vicarige of *Taston* in the County of *Southampton* came unto the Queen by Lapse: the Ordinary of the Diocess Col-
lated A. to the Vicarige; afterwards the Queen presented B. who thereupon brought a *Quare Impedit* against the Bishop and the Incumbent, depending which *Quare Impedit* A. by Covin and fraud obtained a new presentation to the same from the Queen, without making mention of the pleasure of the Queen to repeal or to revoke her first presentment: In this Case, it was holden by the whole Court, That the second presentation in it self had been sufficient, and had been a repeal of the first, if it had not been obtained by the fraud and covin of A. And so it was adjudged in the Court of Common Pleas, Mich. 4. Jac. in the Bishop of *Bangor*, and *Williams Case*.

4 Jac. Bishop of
Bangor and
Williams Case.

If the King hath Cause for to present by reason of Lapse, or otherwise, and presents I. S. to the Bishop; and before he is Instituted and Inducted, the King dyes, and the Successor King without reciting or mentioning of the presentment of his Predecessor, presents I. D. to the same Church: It was in that Case (amongst other points) adjudged, Mich. 8. Jac. in the Exchequer in *Calvert* and *Kitchins Case*, that the very decease of the King did determine the first presenta-

Mic. 8 Jac. C. 3
Calvert and *Kitchins Case*.

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44 E.3.31.b. acc.

V. 16 Eliz. Dyer
317. acc.

tion : For that the Presentation was but a power given to the Ordinary, which was Countermendable, and revokable; and by the Presentment of him, I.S. had *neque Officium, neque Beneficium* : and further in that Case it was Resolved, That the first presentation was repealed, although it was not recited by the King : and was not within the Statute of 6. H. 8. cap. 15. That the King ought to recite the same : For it was agreed by the Justices, that that Statute went and extended only to Leases, and did not extend to Presentations to Churches, or other Spiritual promotions.

C A P. XIII.

Of Examination of the Clerk by the Ordinary: Of Admission and Institution, at what time and place the same may be; Where the Ordinary may refuse to admit the Clerk, because the Church is Litigious; and where Jure Patronatus shall be awarded: Where there shall be a Plenarty by Institution. And how Plenarty and avoidance shall be tryed.

WHen the Patron upon the Avoidance hath presented his Clerk within six Moneths, which is the time limited

limited by the Law, the Bishop or Ordinary is to admit and Institute the Clerk presented to the Church: But before he be admitted into the same, the Bishop or Ordinary ought for to examine him of his ability. For if upon Examination the Clerk presented, be found to be unable to serve the Cure, or that he be criminous, as before is said, then may the Ordinary or Bishop refuse to admit such Clerk to the Church: But yet *vide* 40. E. 3. Qu. Imp. 128. If the Clerk be not of ability at the time of the refusal of him by the Bishop: Or if issue shall be taken upon his ability: If the Bishop after such Issue joined, doth institute him to the Benefice or Church, he shall be adjudged to have been alwaies of Ability, and the first presentation of him shall stand and be good, and he shall not need to have a New Presentation.

Pasc. 26. Eliz. Moor. 1. pt. The Bishop of Herefords Case. The Patron presented his Clerk who was refused for Insufficiency of which notice was given to the Patron: He presented another Clerk, and then within the 6 Moneths the Bishop admits the first Clerk. Resolved the Bishop was a Disturber, and a *Quare Impedit* did lye against him: For that once having refused him for insufficiency he cannot afterwards accept of him. v. 3. Cr. 271. same case.

This Examination of the Clerk is to be done by the Bishop or Ordinary at a convenient time within the six moneths after the Clerk is presented unto him; For the Ordinary cannot refuse to examine the Clerk during all the six Moneths, and by reason thereof suffer a Lapse to run to himself; For if he should so do, the Patron might lose his presentment, and the Ordinary should take advantage of his own wrong in his not examining of the Clerk within convenient time: But if the Ordinary (when the Clerk comes to be examined) *seder circa Curam Pastoralem*, the Ordinary is not bounden to leave the Business in hand, and presently examine the Clerk, but to make an end of his other business first, and then to examine the Clerk: And the Ordinary may appoint a convenient time and place for the Clerk for to attend for the examining of him.

22 H. 6. 29. acc.

5 H. 7. 7. Mic.
5 Eliz. in C. B.
adjudged acc.

Tr. 33 Eliz. B. R.
Palmer and Bi-
shop of Peterbo-
rough's Case, v. Cr.
3 part, 244

In a *Quare Impedit* brought by *Palmer* against the Bishop of *Peterborough*, for not admitting his Clerk to the Church, the Bishop pleaded, that he demanded of the Clerk the Presentee of the Plaintiff, to see his Letters of Orders, and he would not shew them unto him, and this he did, because he was not ascertained whether he was a Deacon or not; and he also demanded of him Letters Missive, or Testimonials testifying his Ability; and because he had not his Let-

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ters of Orders, nor Letters Missive, nor made proof of them to the Bishop, he desired leave of the Bishop to bring them, who gave him a Weeks time, but the Clerk came not again, so the six moneths passed, and the Bishop Collated for a Lapse: Upon this plea of the Bishop it was demurred in Law, and it was adjudged for the Plaintiff against the Bishop; For it was said by the Court, that these were not Causes to stay the Admittance, and that the Clerk is not bounden to shew his Letters of Orders, or Missive to the Bishop, but the Bishop is to go to the Examination of him without his shewing of them.

If the Bishop upon Examination of the Clerk presented, find him to be of Ability to serve the Cure, and to be capable of the Benefice: then doth he admit him to the same, in these or the like words, viz. *Admitto te Habilem*: and afterwards he doth Institute him unto the Benefice or Church, and giveth him his charge thereof in these or the like words, viz. *Institute Rectorem Ecclesie Parochialis de D. & habere curam animarum, & Accipe Curam tuam, & meam, V.* 32. H. 6. 28. Where it is said, A man may be a Parson of a Church without his knowledg: For if the Bishop say to another, *Admitto te ad tale Beneficium nomine A. B.* this admission is an Institution of him.

Co. 4 part. 79.
32 H. 6. 28. b.
33 H. 6. 24. a. c.

Pasc. 21 Jar. in C.
B. Knollys and
Dobbins Case ad-
judged, acc.

It is not material, Whether the Examination, Admission, or Institution be made by the Bishop within his own Diocese or not; For the Bishops Jurisdiction, to such and the like purposes, is not Local, but followeth the person of the Bishop: And therefore if a Clerk be presented to the Bishop of *Norwich*, to a Church which is void within his Diocese of *Norwich*, although that the Bishop be in *London*, or in any other place out of his own Diocese; yet he may there Examine that Clerk, and give Admission unto him: for that the Jurisdiction of Bishops, as to the making of Clerks, admitting of them, the granting of Administrations, and the like, is not Local, but followeth the person of the Bishop wheresoever he is: as it was adjudged, Pasc. 27. Eliz. in Co. B. in *Carter and Crofts Case*.

45 E. 3. tit. Pre-
sent. 3 Dr. and
Student. 116. acc.

If two Joynt. tenants, or Tenants in Common be of the Patronage, and they cannot agree in their Presentment, but vary and present several men to the Bishop; in such Case, the Bishop is not bounden to admit any of their Clerks; and if the six moneths do incur before they agree, the Bishop may Collate a Clerk of his own to the Church: but he cannot Collate within the six monthes; for if he do, they may agree and bring a *Quare Impedit* and remove the Incumbent, for that his Collation was a Disturbance. But if there be

34 H. 6. 46 5 H. 7.
8. 11 H. 4. 8.

two Coparceners, and the Church doth ^{21 H. 6. 45. acc.} become void; and the eldest Sister doth present, the Bishop is bounden to admit her Clerk: for that by the Law the eldest Sister shall have the first presentment, unless there be an agreement made ^{31 H. 6. 32. 21 H. 6. 45. by Ascough. 20 E. 3 21. Imp. 63.} betwixt them to present in some other manner. And *v. 22. E. 4. 9.* So it is, That the Husband who is Tenant by the Curtesie in the Right of the Eldest Sister shall first present.

If two men present one man severally to the Bishop, the Bishop cannot admit him generally to the Church: But the Bishop in the Admittance of the Clerk to be Incumbent, must admit him as Clerk and Incumbent of the Presentation of one of them: as it was Resolved, Mich. 8. Jac. in the Common Pleas in *Danby* and *Lindleys* Case: And if they make such Presentation, claiming by several Patrons, or Titles; The Bishop is to direct the Writ *de jure Patronatus*, which is in the nature of a Commission, (and may issue forth as well after the several Presentments as before) because the Church is Litigious: But the Bishop is not to award the *jure Patronatus* but at the request and prayer of the parties: But yet it seemeth by the books of *5. H. 7. 22.* and by *Brian*, 34. H. 6. 38. that the *jure Patronatus* must be sued forth at the cost and charge of the Bishop, because it is for his Excuse, and so for his Advantage.

22 H. 6. 25. & 26

21 H. 6. 44. 2.

7 E. 4 21. Imp.
100 Dr. & Stud.

117.

Yalc. 26. Eliz. in
C. B. Gerrard and
Chambers Case.
V. Leon, 2. pt.
Reports 98.
v. Leon, 2pt. 158.
the same Case.

In 26. Eliz. in the Common Pleas in a Prohibition, the Case was. Gerard Master of the Rolls, Presented Chatterton Bishop of Chester to the Church of Bangor, to which Church one I. S. also Presented his Clerk; by which several Presentments the Church became Litigious; the Archbishop of York being Ordinary of the place, awarded *jure Patronatus*; depending which the said Archbishop admitted Chatterton to the Church: I. S. thereupon libelled in the Spiritual Court against the Archbishop, for that he the said Archbishop, *predicto Episcopo plus a quo fidens admisit dictum Episcopum pendente jure Patronatus*; and now came the Archbishop and prayed a Prohibition, which was granted by the Court: For in this Case it was said by the Court, That the awarding of the *jure Patronatus* is not a thing of necessity, but at the will of the Ordinary, and for his better Instruction: For if he will at his peril take notice of the right of the Patronage, he may receive which of the Clerks he will, without a *jure Patronatus*.

Dr. and Stud. 117.

33. H. 6. 32.

22 E. 4. 4.

But if two Coparceners be of an Advowson, and the Church void and they severally Present to the Ordinary, this doth not make the Church to be Litigious, because they claim by one title: And so it is, if they make composition to Present by turns, and one of them doth usurp in the turn of the other, such

Usurpa-

Usurpation doth not put the other out of possession.

By Institution made by the Bishop, the Church is full of an Incumbent as to the Spiritualties; that is to say, to celebrate Divine Service, to Administer the Sacraments, to Preach and Instruct the Parishioners in the true Faith, &c. and in a *Quare Impedit* brought, Plenarty by Institution is a good Plea against a common person and yet the Incumbent wanteth the Temporalties by which he should live, which he hath not before he be Inducted; for upon the Induction, the Temporalties, viz. the Gleab, Offerings and Tythes are vested actually in him.

V. Plow. Com. 528.

22 H. 6. 31. 24 E. 3.

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38 E. 3. 4.

24 E. 3. 30. not against the King before Induction.

In an *Ejectione firma* by the Lessee of R. Incumbent of the Church of D. the Case was, That the King was the true Patron; and one W. entred a Caveat *in vita Incumbentis*, who then lay sick *in extremis*, in this mannor, viz. *Caveat Episcopus ne quis admittatur, &c. nisi Convocatus*; the said W. the Incumbent dyed; N. a stranger presented one M. who was Admitted, Instituted, and Inducted; afterwards W. Presented one G. who was Instituted and Inducted; afterwards R. procured a Presentation from the King who was Instituted and Inducted: It came in Question in the Spiritual Court who had the best Right? it was the opinion there; that the first institution was *irrita*

Mic. 15 Jac. in B. R. Rones Case, Pophams Reports 133.

& *VACUA*, by reason of the Caveat; & then the Church being full of the second Institution, the Presentment of the King was void. But in this Case, it was resolved by all the Justices of the Court of Common Pleas, 1. That this Caveat was void, because it was in the life of the Incumbent: 2. That the Church upon the Institution of M. was full against all but the King: and then the Presentation of G. was void, by reason of the Superinstitution; and no obstacle was to hinder the Presentation of R, the Kings Presentee, and that the said R. had the best Right.

23 H. 6. 27. acc.

Cook 4. part. 77.
in Digbys Case.

If a Clark be admitted and Instituted into a Benefice with Cure of souls, of the clear yearly value of 8. l. *per an.* and before he be Inducted he accepteth of another Benefice with cure of souls, and is Inducted into the same, the first Benefice is become void by the Statute of 21. H. 8. of Pluralities; For in Judgement of the Common Law, he that is Instituted into a Benefice, hath accepted of the same, and the Church is full within the Intent of that Statute without Induction; and yet the Incumbent is not so absolutely Parson by the Institution, that he can then charge the Church to bind the Successor before Induction: And therefore, if a Prebendary, Parson, or Vicar, after he be admitted and Instituted, and before he be Inducted, grants an-

W. Plow Com.
128 in Hare and
Bekleys Case.
acc.

Cap. XIII. **Parsons Law.**

107

Annuity out of the Prebend, Parsonage, or Vicarage, and the same be confirmed by the Patron and Ordinary, or by the Dean and Chapter : yet this shall not charge the Gleab, or the Successor of the Prebendary or Parson : for although by the Institution he hath *jus ad rem*, yet he hath not *jus in re*, but the Charge in such Case shall lye upon the Parson, and not upon the Lands.

At the Common Law, if a Stranger had presented his Clark to the Bishop, and he had been admitted and Instituted to the Church whereof a Common person was the Patron, the Patron had no remedy for to recover his Presentment, or Advowson, but by a Writ of Right of Advowson, by which the Incumbent was not to be removed ; and so it was, if an Usurpation had been upon an *Infant* or a *Feme Covert* who had an Advowson by Discent, Plenarty generally was a good Plea against them, and the reason thereof was, that the Incumbent might quietly intend and apply himself to his Spiritual charge, and also for that the Law intended, that the Bishop who had Cure of the Souls within his Diocess, would admit and institute an able man for the Officiating of the Cure, and the Discharge as well of the Bishops duty, as of his own : But yet at the Common Law, if one had usurped upon the King, and his Clark had been admit-

Cook 1 part, Ia.
stit. 344.

admitted, instituted and inducted, the King might have removed him by a *Quare Imp.* and been restored to his Presentation by reason of his Prerogative, That *Nullum tempus occurrit Regi*; but he could not have presented, neither could have removed the Incumbent any way but by Action: But this mischief was remedied by the Statute of *West. 2. cap. 5.* which gave the *Quare Impedit* to the party notwithstanding such Plenarty, *quomodo*

45 E. 3. 39.
18 Eliz. Dyer
348. 38 E. 3. 4. acc.
25 E. 3. 47.
33 H. 6. 24. a.
V. Mich. 15. Jac.
Cro. 2 pr. Hutchins and
Glovers Case.

18 Eliz. in C. B.
Giles Case.

24 E. 3. 31.

Breve infra tempus semestre impetretur: And at this day the Church is not full by institution against the King: For (as I said before) the King at this day before induction, may Repeal and Revoke his former Presentation, which he could not do if the Church was full of an Incumbent, as it was adjudged, 18 Eliz. in *Giles Case*, which Case is vouched in *Cook 10 part, 133. in Holts Case.*

24. E. 3. 31. In a *Quare Impedit* brought by the King against the Bishop of *Winton* and B. the Case was, the Bishop did present A. to the Church, who was inducted: Afterwards A. accepted of a Plurality, by which the Church became void, and afterwards the Bishop presented B. to the Church, who was instituted and inducted; the King brought a *Quare Imp.* against the Bishop, and B. and Recovered, and had a Writ to the Bishop to admit his Clerk.

If the Bishop Collate to a Church, and before

before induction of the Clark, the Bishop dyeth, and the Temporalities of the Bishop are seized into the Kings hands, the King shall present to the avoydance, because the Church was not full against the King till induction.

This Plenarty is a Spiritual thing, and therefore, if it come in Question, Whether the Church be full of an Incumbent or not, the same shall be tryed by the Certificate of the Bishop, who best knows of the Institution: But if the Issue to be tryed be, Whether the Church be void or not, the same shall be tryed by a Jury at the Common Law, unless the Issue to be tryed, be upon some special act of Avoydance, for then, the same shall be tryed by the Certificate of the Bishop, so as the especial Cause of Avoydance, be Spiritual.

V. 5 E. Dyer. 317.
21 E. Dyer. 317.
50 E. 3. 17. & 18.
22 E. 3. 10.

V. 39. E. 3. 2. If ability of the Clark who is dead, comes in question; and Issue be joyned upon it, it shall be tryed by Jury in the County where the examination was,

C A P. XIV.

Of Induction; by whom the same is to be done. How far the Parson, or Vicar upon their Inductions, may charge the Gleab. What Actions they may have for their Possessions after their Induction: And of their Payment of first fruits.

THE last thing for the making of the Clark presented, compleat incumbent of the Church, is Induction; This

Plow. Com. 938.
Hare and Bick.
175 Case acc.

11 H. 4. 76 b.

34 H. 6 Qu. Imp.

162.

11 H. 4. 9.

38 H. 6. 15 acc.

V. Flow. Com. in

Hare and Bic-

leps Case. The

Induction is but

a Ceremony to

give notice of

the possession;

the substance is

the Institution.

V. F. N. B. 47 h.

36 H. 8. 3. by

Knighth.

F. N. B. 36. p.

V. Cook 1. pt. 128

acc. resolved by

the whole Court.

38 H. 6. 15 b.

but note, That
they cannot
there award da-
mages: but for
them suit must
be at the com-
mon Law.

38 E. 3. 2. Imp.

135.

21. E. 4. 3. acc.

Stark e

Flow. Com. 328.

acc.

22 H. 6. 28. a.

This is usually done by the Arch-deacon; but may be done by the Bishop himself: which is nothing else, but the putting of the Clark in possession of the Church, Gleab-Lands, Tythes, Offerings, and other the Temporalties of the Church.

If the Archdeacon will not Induct the Clark after such time as the Bishop hath admitted and instituted him, and directed his Letters to the Archdeacon to induct him; By the opinion of Mr. *Fitzherbert*, an Action upon the Case will lie against the Archdeacon, because that the Induction is a Temporal act: But others are of opinion; and so likewise it was adjudged, Pasch. 33. Eliz. in Co. B. That a Citation shall be awarded out of the Spiritual Court against the Archdeacon, and he shall be punished there, because that the Archdeacon may alledge some special cause, for which, by the Ecclesiastical Law the Clark ought not to be inducted, which cause may not be determined elsewhere, but only in the Spiritual Court.

In 38. E. 3. Qu. Imp. 135. it is said, that he is not Parson *in facto* untill induction: and therefore it is said there, that if a Writ of Right of Advowson be brought, the Plaintiff ought to count that the party was inducted; But by the induction of him, publick Notice is given to the Parishioners, that he is their Par-

Parson or Vicar who hath the Cure of their Souls: And this is also manifest unto them by his Actions, viz. his entering into, and taking of the possession of the Church, Ringing of his Bells, &c.

After he is inducted, he may by the Statute of 25. E. 3. cap. 7: plead any plea in barr in a *Quare Impedit* brought against him as possession of the Church: As if a *Quare Impedit* be brought against him, he may plead a Release in barr, because he hath the Freehold of the Church and of the Gleab in him, which shall not be lost without his Answer: And after he is inducted, he may maintain any Action Real, Personal, or mixt, for the Gleab, or any thing concerning the possessions; as if a Parson maketh a Lease for life of his Gleab, he shall maintain a Writ *de Consimili Casu* during the life of the Lessee; and a Writ of *Entre ad Terminum quem prateriit* after the death of the Lessee: so may he have an Action of waste, for Waste done on the Gleab Lands: But a Writ of Right for Disclaimer, A Writ of Customes and Services, a Writ of *Ne injuste vexes*, or other VVrits which are grounded upon the meer Right, he shall not have; because that the absolute Inheritance of the Gleab, &c. is not in him, and so he may have and maintain any Action, Suit, or Libel which are personal for the

4 H. 3 Dyer 9.

3 H. 5. 9. 200.

Fitz. N. B. 49 E.
Cook 1 part. 2nd
tit. 341.

2 E. 4. 3.
10 H. 7. 5.

the Tythes, or other profits of the Church detained or withholden from him in his own Name, which he could not have had, sued, or maintained before he was inducted.

V. 11. h. 4. 7. and 1. E. 5. 1. A. Qu. Imp. by the King, the defend. pleaded a Collation by the Bishop, and that he was inducted; and that the King confirmed it by Letters Patt. the King said he was not inducted, *tempore confirmationis*. Adjudge a good plea, for the confirmation was not good, without induction which gains the possession.

✓ 36 H. 8. Dyer.
in Tavernors
Case.
39 H. 6 & 21 H. 7.
acc.

Cook 1. part, In-
stit 96 pl. 136. a.
Plow. Com. 497.
in Grendons C.
acc. Qu The In-
cumbent cannot
grant for In-
cumbency to
another.

Co. 12 pr. 45.
First Fruits were
first given to the
Crown. by Sta-
tute, 26 H. 8. c. 3.

If a Parson, or Vicar who is inducted and compleat, make a Lease of his Gleab and Tythes by Deed, (as the same must so be) for years, the Lease is good. Yet in such case the Parson or Vicar himself must Officiate and Serve the Cure and not the Lessee: For that the Cure being a Spiritual Charge, and Administration doth not follow the Gleab or Tythes; but is annexed inseparably to the person of him who is Incumbent of the Church.

After that the Clark is inducted by the Archdeacon, (or other who hath power to do the same,) He must Compound for the first Fruits with the King before that he can take any of the Profits of the Benefice. For if he taketh any profits before he make Composition with the King for the first fruits, he shall

shall pay double fruits. And for the payment of the first fruits, he must be bound in a penal Obligation with Sureties, and upon the payment thereof, he shall have of the Officer or Receiver of the first fruits, a Bill, testifying the Receipt thereof; and the Obligation shall be delivered up to him again.

C A P. XV.

By what Acts the Church may become void, and the Incumbent removed. And of Avoidance by Death: and Entry into Religion.

I Having settled the Clark presented, v. Draston, lib. 5 cap. 17.
a perfect Incumbent in his Spiritual Benefice with Cure of Souls, and in the possession of the Church, and having given him some power therein and thereof: Let us now see by what, and by whole acts the Church may become void, and the Clark presented may be removed, and put out of his Benefice again.

The Church may become void by several means and Laws, viz. either by the Ecclesiastical and Spiritual Law; or else by positive or Statute Law. And in some cases the Church shall become void by the meer Act of Law: In some cases by the act of the party incumbent, and in some case by a Sentence given in the Spiritual

ritual Court, grounded upon the Act or defect of the party.

In all Cases, the death of the Incumbent is a present avoydance of the Church, and therefore if the Incumbent thereof dyeth, the Church is presently void ; and the Patron at his peril ought to take notice of the Avoydance, and present another Clark to the Bishop or Ordinary to be instituted into the Benefice within six moneths without any Notice to be given unto him of the Incumbents death, otherwise the Lapse shall encurr to the Ordinary, as before is said.

15 Eliz. in C. B.
Leon. 3. pt. 46.
acc.

Cook 1 part, In-
stit. 112.

There is a Natural Death, a Death *de facto* ; and there is a Civil death, a death in Law. As the Natural death maketh a present avoydance of the Church *de facto* : So the Civil death doth make the Church void *de jure*, though not *de facto*.

If a man had entered into Religion, and been Professed (*renunciavit omnibus quæ seculi sunt*) and he was Civilly dead in Law, so as his Profession were in some house of Religion within the Realm, (for of Forrein Professions, the Laws and Judges of the Realm of *England* did not take knowledge) and by such Profession in Religion the Church had become void whereof he was Incumbent before : Yet might the King being *persona mixta*, and having both Jurisdictions, as well the Ecclesiastical as the Civil, have dispensed

fed with such a Parson, or Vicar, that he might have holden all the Benefices that he had, notwithstanding his Profession in Religion : and the Patron had no Remedy for such an avoydance, for that the Church was not void *de facto*, but *de jure* only by the Profession : But in such case, if the Profession had been certified by the Ordinary, and no license or Dispensation had been obtained from the King, to hold his Benefice, then this Civil Death by the Ecclesiastical Law had been an Avoydance of the Church, of which the Patron might have taken advantage, and have presented another Clark unto the Bishop or Ordinary to be inducted into the same.

By the Ecclesiastical and Spiritual Law the Church may become void divers wayes : as 1. By Cession. 2. Deprivation. 3. By Resignation. 4. By Creation. Of all which in several Chapters after very briefly.

C A P. XVI.

Of Avoydance by Cession: What Cession is ; And where upon Cession the Church is void, without Notice: Where not.

BY a Canon made in the Council of Lateran, holden under Pope Inno-

V Moors Report.
437. It is said,
That this Canon
was made, 1271.
in the 2. Coun-
cel at Lions, in
the time of Gre-
gory the 9th an.
vl. He. 3 and the
first Benefice was
void, and All
Dispensations
were taken from
Bishops, propter
stultas & indis-
cretas Episcoporum
dispensationes.
10 E. 3. 1. 5 E. 3. 9.
24 E. 3. 30.
24 E. 3. 26. q. acc.
F. N. B. 3. + L.

cent the third, 1215. it is ordained, *Quod quicumque recipere aliquod Beneficium cum Cura animarum, si prius tale Beneficium obtinebit, sit eo jure ipso privatus; Et si forte illud retinere contenderit, alio sit spoliatus: is quoque ad quem spectat prioris Donatio, illud post receptionem alterius conferat cui merito viderit conferendum.* This Decree or Canon is general. And if a Parson or Vicar that had one Benefice with Cure of Souls, had taken another Benefice without License or Dispensation, the same had been an Avoydance of the first Benefice, called Cession of the first Benefice by the said Canon, without any Sentence Declaratory to have made the Church void.

In 31. Eliz. in the Kings Bench, the Case between *Underhill* and *Savage* was this; *Savage* was presented to a Benefice; and afterwards he was presented to another, and then purchased a Dispensation, and was qualified, and afterwards he accepted of the Archdeaconry of *Glocester*; In this Case two points were resolved, 1. That by acceptance of a second Benefice, the first Benefice was void by Cession; without any Sentence Declaratory by the Statute of 21. H. 8. cap. 13. 2. That if one hath a Benefice with Cure of Souls, and he accepts of an Archdeaconry, that the same was not a Benefice with Cure of Souls within the said Statute, as to make his first Benefice void.

And

Cap. XVI. Parson's Law.

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Cook 4, part 77.
in Hollands case.

And although by Cession the Church was said to be void, yet by such Cession it was not so absolutely void *de facto*, that the Lapse should have incurred against the Patron if he had not presented another Clark unto the Church within six moneths, unless notice had been given to the Patron by the Ordinary of the said Cession. So if the Incumbent of a Parsonage or Vicarage with Cure, had been made Dean of a Cathedral Church his first Parsonage or Vicarage had been void by Cession by the Ecclesiastical Law, and by the said Canon, because that the Dignity and the Benefice were not compatible; and the Statute of 21. H. 8. cap. 13. is but an affirmation of the Ecclesiastical Law, and of the said Canon as to this point: But the King might have dispensed with the said Canon, and might have enabled any Parson or Vicar to have holden two Benefices with Cure of Souls, notwithstanding the said Canon made in the Court of *Rome*: For notwithstanding that divers Ecclesiastical Laws and Canons were first made in the Court of *Rome*: yet afterwards they being used and confirmed within this Realm, they by acceptance and usage became the Ecclesiastical Laws of this Realm: And therefore although the said Canon which maketh the taking of a second Benefice to be a Cession of

5 E. 3. 9. 2. Imp
35. 24. E. 3. 38.

the first, was made and devised in the Court of *Rome*, and notwithstanding that, they yet might have dispensed with the said Canon, (and so did) in many Cases: Yet it is adjudged 9. E. 4. 44. in the Case of the Prior of *Oxgate*, that by force of that Canon, and so by the Ecclesiastical Laws of the Realm; by the taking of a second Benefice, the first Benefice became void by Cession.

V. 14 M. 2. 17. acc.

If any one presenteth himself to a Church, who hath a former Benefice with Cure; this is a Cession by the Ecclesiastical Laws of the Realm: But the Courts and Judges of the Common Law are not to take notice of such Cession, untill the same be certified unto them from the Ecclesiastical Court by the Ordinary.

CAP. XVII.

Of Avoidance by Deprivation; What are Causes of Deprivation in the Spiritual Court approved by the Common Law. Where upon such Avoidance Notice must be given to the Patron by the Ordinary; Where not.

THe second means of Avoidance of the Church, or Benefice with Cure, is Deprivation, which although it be the Act of Law in the Spiritual Court: yet
it

it is grounded upon some act or defect of the party deprived, and is the Discharge of the Incumbent of the Officiating of his Cure or Benefice by a Sentence Declaratory in the Spiritual and Ecclesiastical Court upon a sufficient Cause proved in the same Court against him.

Causes of Deprivation in the Spiritual Court (all which are allowed of by the Common Law) are, *Conscientia Criminalis*; *Debilitas Corporis*; *Defectus Scientie*; *Malitia Plebis*; *Grave Scandalum*; *Irregularitas persona*; Hereſie, Schiſm, and many others.

In 5. R. 2. A Cardinal was Collated by the Bishop of *Durham* unto a Benefice with Cure, the Bishop dyed, and the Temporalties of his Bishoprick being in the Kings hand, the King brought a *Qu. Impedit*, and ſhewed that the ſaid Cardinal was Miſcreat, and deprived for Miſcreancy in the Court of *Rome*: In that caſe it was adjudged, that it was a good cauſe of Deprivation of him; And there *Belknap* one of the Judges, ſwore the Law to be, That if a man for adhering unto the Kings Enemies, ſhall forfeit his Lands for ſuch his adherence, and the King ſhall have the Eſcheat of them becauſe he is out of the Faith of his Liege Lord, the King; *a fortiori*, he ſhall forfeit his Living, who is out of the Faith of God: And it was in that caſe fur-

ther agreed, That although the said Cardinal was deprived in the Court of *Rome*; yet whether he was Miscreant, or not Miscreant, should be tryed here in *England* where the Church was, by the Bishop of the Diocess there.

38 E. 3. 2. & 3.

If the Clerk presented be Perjured, and be thereof convicted or attainted in the Spiritual Court upon proceedings of their Law there, or by his own confession, the same is a good cause there for to deprive him of his Benefice; but the Patron of this Deprivation must have notice given by the Ordinary: and so it is if the Clark presented, be Irreligious, Illiterate, Bastard, Villein, or a meer Lay-man; who hath not taken Orders from the Bishop.

V. 5 H. 7. 14. acc.
25 Eliz. in C. B.
Leon. 3. pt. 45
acc.

If a Parson of a Church be convicted at the Common Law of Manslaughter, and prayeth his Clergy; and hath it granted unto him: yet the same is a good and sufficient cause for them in the Spiritual Court for to deprive him of his Benefice, as it was adjudged, Tr. 15 El. in the Kings Bench in *Searls* case.

V. 19 Eliz. Dyer.
353 B. 2. 2. Cas.

If the Patron presenteth to the Bishop a Lay-man under the age of 23. years, who is admitted, Instituted and Inducted into the Church: and after he is sued in the Spiritual Court by a stranger to be deprived for his said incapacity, and afterwards a *Quare Impedit* is brought against the Ordinary, and the Incumbent

Incumbent, and Judgement therein is given against the Incumbent for his default at the Grand Distress, as it may be, and afterwards the first Incumbent by Sentence pronounced in the Spiritual Court at the strangers suit there is deprived; This Deprivation of him is good, although that he was before removed out of his Benefice upon the Judgement given against him in the *Quare Impedit*; But if the Incumbent doth afterwards bring a Writ of Disceit upon the Judgement given in the *Quare Impedit* by default, for that he was not summoned, He shall have Judgement thereupon; and the Deprivation in the Spiritual Court shall be no impediment unto him, for that in the *Quare Impedit* the Incumbency was not in question; and he shall be restored to what he lost.

If the Patron presenteth a meer Layman, the same is a good cause of Deprivation of him, if he be Instituted and Inducted; But after such Institution and Induction, he is Incumbent *de facto*, and he ought to be deprived by a Sentence in the Spiritual Court; and of such Deprivation, the Ordinary must give Notice to the Patron: But if the Patron doth present a meer Layman, and the Ordinary doth refuse to admit him, there the Ordinary needs not to give Notice to the Patron of it, for that it is notorious that he is incapable.

37 H. 6. 5. acc;

13 El. Dyer. 392. acc.

3 Cr. 775. Co. Hard and Windel,

V. 27 El. in C.B. Albany and the Bishop of Assaphs Case. Leon. 1. pt. 32. The Ordinary refused a Clark presented to a Church in *Wales*, because the Parishioners were *Homines Wallici, Wallicam Linguam loquentes & non aliam*: It was holden That by the Common Law the same was no good cause of Refusal, nor Cause of Disability in the Clark presented. But now since the Statute of 5. El. for the translating of the Bible and Common Prayer-Book into English, the want of the Welsh Language in a Clark is holden to be a good cause of Refusal for a Clark by the Ordinary: but the said Act must be pleaded.

29 E. 3. 16.

20. H. 6. 46.

2 H. 4. 3. by *Thir-*
mir.

Co. 11. pt. 72.

Cook. 11. part. 40.
in *Lyfords Case*.

Mic. 12 Jac. B.R.
the Bishop of
Salisbury Case.

6 E. 4. 134. 2.

In ancient times, if a man had been a Dilapidator of his Church, he might have been deprived for the same cause; as if a Bishop, a Prebendary, or a Parson had committed Waste in the destroying and cutting down of all the Timber Trees, or Woods, that were standing or growing upon the Lands, or had pulled down the houses belonging unto, or parcel of his Bishoprick, Prebend, or Parsonage, he might have been deposed, and deprived of his Spiritual Living in such Cases: and so it was adjudged, Mic, 12, Jacob. in the Kings Bench in the Bishop of *Salisbury* Case. And so it was, if a Parson, Vicar, or other Ecclesiastical person seized in the Right of the Church, had aliened the Lands of the Church

Church, he might have been deprived for the same cause: But I conceive, that the same doth not hold to be Law at this day: But *Quere* of it.

In the time of Queen *Mary*; for a Priest to have been married, had been a good cause for to have Deprived him of his Benefice in the Spiritual Court, and many Presidents there are thereof; but the same is not so now.

An Incumbent was admitted, Instituted and inducted into a Benefice with Cure of souls, in the time of King *Edward* the sixth; and afterwards, in the time of Queen *Mary* he was deprived, because he was a married man, and a favourer of the Religion in the time of King *Edward* the sixth, and the Church being void by this said Deprivation, another man was Instituted and Inducted into the same Church: and afterwards in the time of Queen *Elizabeth* the last Clark presented was deprived, and the first Sentence of Deprivation in the time of Queen *Mary* adjudged and declared to be void, and the first Incumbent restored to the Benefice. It was adjudged in that Case, that the Deprivation of the first Incumbent in the Spiritual Court was good, and stood good, untill that afterwards the same was declared to be void, and untill then the second Clark presented was Lawful Incumbent: But when the Sentence of repeal came, and made

40 H. 6. 46. by *Ascough.*

4. Mai Dyer. 133.

Cook 4. part. 102. *Winfers* Case.

V Moor 558. the same Case.

V. Pasch. 40. Eliz. Loveden and *Hitches* Case. Moor 38.

made void the first Deprivation, then was the first Incumbent in the Church again of his first Presentation, Institution and Induction, and needed not any new Institution and Induction to the Church.

Tr. 13. Jac. in Horingald and Brians C. Bolst. 3. pt. 72. & 2. H. 2. Fitz. Qu. Imp. 143. If a Judgement of Deprivation be against a Parson, if he make his appeal, the Church is not void, but he remains Parson during the time of appeal; and, if he doth reverse the Judgment he needs no new Institution and Induction. V. 6. Jones in C. B. Lechmore and Carrs Case. Vouch. Bolstr. 3. pt. 73. the appeal did only suspend the Deprivation. V. M. 3. El. Owen. 12. Gustons Case. for a difference.

39 H. 6. 19. acc.

In 39. H. 6. 19. in a *Qu. Imp.* the Plaintiff counted that the Church was void by the Deprivation of I. S. who was incumbent of the same; The Defendant shewed, that he had sued forth a Repeal of the said Sentence of Deprivation: but because he did not plead the certainty of the same, how and in what manner it was, the plea of the Defendant was disallowed by the Court: Out of which case it is clearly to be gathered, the Deprivation stood, and I. S. was not Incumbent of the Church.

There are many other Causes of Deprivation of the Incumbent, which at this day are allowed and approved of by the Common

Cap.XVII. Parsons Law.

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Common Laws of the Realm, as good Causes of Deprivation in the Spiritual Court, viz. Disobedience to the Ordinary, Incontinency, Drunkenness, &c. Or if a Parson, or a Vicar had remained Excommunicated by the space of forty days and had not been received into the Church, the same had been a sufficient cause in the Spiritual Court to have deprived him of his Benefice which he then held. But in such and the like cases, the Church was not void *de facto*, without a sent. given in the Ecclesiastical Court: And at this day the King may pardon the Offence; and, then he shall not be deprived or ousted of his Benefice by such sentence.

But it is to be noted, That in all cases of Deprivation in the Spiritual Court, there must be a sentence in force against the party; For if sentence should be given in the Spiritual Court against the Incumbent for any of the Causes aforesaid and he make his appeal to a Superiour Court, depending the appeal, the first sentence is in suspense, and the Church shall not be void, until the sentence upon the appeal be approved, and confirmed; and if the first sentence be disaffirmed and Repealed, then is the party still Incumbent by force of his first Presentation, Institution and Induction of him to the Church.

V. Cawdry and Attons Case A Man was deprived of his Rectory by the High Com. because he uttered scandalous and contumelious words against the Book of Common Prayer. Popham. 59. Moor 775. Parson is deprived for not conforming to Ceremonies.

11. 30 El. B.R. Frankwells Case Leon. 2 pt. 176. If a sentence of Deprivation be in the Spiritual Court, and there be an Appeal to the Delegates: yet the Sentence shall bind till it be reversed.

V. Bird and Smiths Case. Moor. Upon a Deprivation by the High Com. No Appeal lyeth because the Commission is grounded upon the prerogative of the King in the Ecclesiastical Government. 2 R. 2 tit. 23. Imp. 134.

CAP.

CAP. XVIII.

*Of Avoidances by Act of Parliament;
And where upon such Avoidances by
Parliament, Notice is requisite:
where not: And what manner of No-
tice is sufficient: what not.*

THere is an Avoidance of the Church
also by Statute Law, in which cases
there needeth not any sentence to be gi-
ven of Deprivation of the Incumbent
in the Spiritual Court.

v Mic 9. Car. C.
B. rot. 441. The
King and the Bi-
shop of Canter-
bury and Pryst
Case, Cr. 1. p. 258.
acc.

The Statute of 21. H 8. cap. 13. is, that
if any Parson having a Benefice with
Cure of Souls, of the yearly value of
8. l. doth accept and take another Bene-
fice with Cure of Souls, and be institu-
ted and inducted into the same, imme-
diately after possession had thereof, the
first Benefice shall be adjudged in Law to
be void, and the Patron shall present in
such manner and form, as though the in-
cumbent thereof had dyed.

By this Statute, if the incumbent had
taken a second Benefice without Dispen-
sation, the first Benefice had been void
without any Declaratory Sentence of
Deprivation made of the incumbent in
the Spiritual Court; and of such Avoid-
ance the Patron is to take notice at his
peril.

Pasc. 26. Eliz. in the Common Pleas,

if a man be presented to a Benefice with Cure of Souls of the value of 8. l. *per an.* and afterwards he is presented unto another Benefice of the value of 20 l. *per an.* and then is deprived for Plurality: it was adjudged in this case, that the Ordinary must give notice to the Patron; for till Deprivation it is no Cession. *Quere*, But if a man hath a Benefice with Cure of Souls of the clear yearly value of 8. l. and taketh another Benefice without Dispensation, and doth not read the Articles of Religion appointed by the Church, and the Act of Parliament, and afterwards dyeth, The admission and institution of him into the second Benefice, was meerly void, and the first Benefice was void by his Death and not by the Statute of 21. H. 8.

The words of the Statute of 21. H. 8. cap. 13. are [Shall take another Benefice with Cure of Souls of the yearly value of 8. l.]

V. Moor 261. Resolved by the Justices in B. R. That if one who hath a Benefice, be a Prebend, it is not an Avoydance of the Benefice, within 21 h. 8.

In the eighth year of the Reign of King *James*, a Question was in the Court Common Pleas, what value the Parliament of 21. H. 8. intended; Whether the very value of the Benefice, or the taxed value, *viz.* as the same was valued at

9 Eliz. Dyer 255.
the first Benefice
is void without
Notice,

V. 9. E. Dyer 255.
7 E. Dyer 283.
Co. 4. pt. 79.
23 E. Dyer 377.

Pasc. 8 Jac. in C.
B. the King and
the Bishop of
Bristol and Han-
leigh case.

at in the Book of first fruits : The case was this, the King brought a *Qu. Imp.* against the Bishop of *Bristol*, and *Hauleigh* incumbent, for disturbing of him to present to the Church of *Swyre* in the County of *Dorset*; which came unto him by Lapse. And set forth the Statute of 21. H. 8. and shewed, that *Hauleigh* the incumbent the Defendant was Parson of *Swyre*, and that *Swyre* was a Benefice with Cure of Souls, of the value of 8. l. viz. of the value of 30 l. *per an.* and further set forth, that the Defendant *Hauleigh*, had taken another Benefice with Cure, viz. of *Milbury Buck*, in the said County of *Dorset*, by reason whereof, the first Benefice was void, and continued void for two years, and so the King ought to present, and the Defendant did disturb him. The Bishop pleaded, that he claimed nothing but the admission and institution as Ordinary : *Hauleigh* the incumbent pleaded a special Plea, viz. By Protestation, that the Church of *Swyre* at the time of the making of the Statute of 21. H. 8. was but of the value of 7. l. 4. s. & *non ultra* : and pleaded the Statute of 26. H. 8. by which, the Lord Chancellor had Commission to enquire of the value of all Benefices, and to certify the same into the Exchequer; and that a Commission was awarded unto divers Knights and Gentlemen in the County, who upon Inquisition found

and

and returned, the Church of *Smyre* to be of the value of 7. l. 14. s. 4. d. which was certified by them into the Exchequer; and that he was instituted and inducted into the Church of *Smyre*; and because the same was but of small value, the Archbishop of *Canterbury* afterwards *quantum in se est*, did grant unto him Dispensation, to take another Benefice, which Dispensation was confirmed by the Kings Letters Patents; and that afterwards he was presented unto, admitted, instituted, and inducted into the said Church of *Milbury Buck*, being a Benefice with Cure, of the value of 8. l. per an. and upon the plea of the said Defendant *Hauleigh*, *Henry Hobard* Kt. the Kings Attorney General did demur in Law. This Case was argued by all the Serjeants at the Bar: and *Tr. Pasc.* 8. *Jacobi* by the Justices, viz. *Foster*, *Warbarton*, *Walmesly*, and *Cook* Chief Justice: and the Court was divided in their opinions; For *Foster*, and *Walmesly*, Justices held, That the value should be taken according to the taxed value, and as the same was in the book of first-fruits: But *Warbarton*, and *Cook* Chief Justice, were of opinion, That the value in the Act of 21. H. 8. should be taken the very value of the Benefice, and the Case was adjourned for variance in opinion and difficulty into the Exchequer Chamber: And as I have heard, the Case was after-

K

wards

M. 29 & 30. Eliz.
in C. B. Marth &
Josei Case. A
man made a Feo-
offment before
the Statute of
Qu. Emptores
terrarum to hold
of him by Knights
service; solvend.
post quam-
libet alienatio-
nem, the value of
the annual pro-
fits of the Land.
Adjudged the
Value shall be
intended such a
value as was the
Value at the time
of the Feoff-
ment, and not as
it is improved
by succession of
time.

40 Eliz. in C. B.
Bush and Smith's
 Case.

v. 14 E. 3. 35. by
Stons acc.

3 E. 2. Recovery
 in value 1. by
Birrey 7 Eliz.

Dyer 137 v. *Bond*
 and *Trickett's* case.

Tr. 43. Eliz. 101.
 364 B. R. Now
 reported in Cr.
 part 3. p. 858.

wards compounded by order from the Kings Majesty. And in the proof and maintenance of the opinions of *Warbarton* and *Cook*, some Presidents were shewed in the Court of Common-Pleas: One in 40 *Eliz.* in the Court of Common-Pleas between *Bush* and *Smith*; where issue being taken upon the value of the Benefice, the Jury found the value to be according to the very value, and not according to the taxed value, as the same is in the Book of first-fruits: One other President was 41 *Eliz.* between *Bond* and *Trickett* for the Parsonage of *Marston*: Where *Anderson* Chief Justice at the Assises, directed the Jury (the issue being upon the value of the Benefice, to find according to the very value, and not according to the taxed value,) and so the question rested, and was not stirred again untill *Pasc. 10. Car. R.* at what time it was moved again in the Court of Common-Pleas, and was there argued by *Brampston* and *Darcy* Serjeants, and the Court then seemed to incline against the opinions before delivered by *Warbarton* and *Cook* in *Hauleighs Case*: But the Case was not then resolved or adjudged, but it remaineth a Question undetermined. *Query the Law.*

The Statute of 13. *Eliz. cap. 12.* ordaineth, That he that doth not subscribe unto the Articles, nor read the Articles of Religion, shall be deprived *ipso facto*, and

Cap. XVIII. Parsons Law.

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and all his Ecclesiastical promotion shall be void, as if he were naturally dead : Upon such an Avoydance, there needeth not any sentence declaratory of deprivation of the incumbent, for there the Church is presently void : And where Avoydance is by Act of Parliament, there needeth not to be any sentence of Deprivation : For if such a Parson or Vicar shall in the Spiritual Court libel against his Parishioners for Tythes : They may there plead against him the not reading of the Articles, without making mention at all, that he was deprived there for the same Cause.

Co. 8. pt. Greens
case. acc.

31 Eliz. *Morris*
and *Ensons* Case,
adjudge. acc.

If one under the age of twenty three years, be presented unto a Benefice with Cure ; It was adjudged, that in such case, That no Lapse shall incurr upon any Deprivation, *ipso facto*, without notice, because that the Act of 13 *Eliz. cap.* 12. speaks nothing of Presentation, so as the Presentation remaining in force, the Patron ought to have notice thereof. *Tr. 18. Eliz. in C. B. the Bishop of Hereford and Okeleys case.*

Tr. 18. Eliz. C. B.
the Bishop of
Hereford and
Okeleys case,
The Presentation
of meer *Laicus*
is absolutely
void at this day
by the Statute
of 13 *Eliz.* but
the presentation
of a meer Lay-
man before the
Statute, was not
void till a Sen-
tence Declarato-
ry.

18 *El. Dyer* 348.

But if an incumbent be Deprived for not reading of the Articles, the Ordina- ry must give notice thereof unto the Patron, and the notice must be certain and particular, that the party hath not read the Articles, and general notice, *viz.* That he is incapable of the Benefice, is not sufficient : Neither is intimation

Tr. 41 El. B. R.
Baker & Brent
case. *Cr. 3 part*
679. acc.

22 El. Dyer 369.

V. Tr. 44. El. B. R.
Grendit and Ba-
ckers Case Yel. 7.
acc.

V. Tr. 24. El. The
Queen and Bi-
shop of Lincoln
and Coker Case.
Anderson. f. 2.

V. Molineux Case
Leon. I pt. 33 ac.
10 Eliz. Dyer 327
acc.

thereof given at the Church door, or in the Pulpit sufficient: but notice thereof must be given to the Patron, and it must be given by the Ordinary. For if the Patron himself, will of himself take knowledg of his Clerks not reading of the Articles, & suffer two years to pass, yet Lapse shall not run upon the patron unless he hath had special notice thereof from the Ordinary, and the Patron hath surceased to present another Clark to the Church: But if the Clark be refused by the Ordinary for inability, illiterature, or for any of the causes before mentioned, whereof notice ought to be given the Patron: If the Patron doth dwell in a far and remote County, so as he cannot easily be found out by the Ordinary: in such case, if the Ordinary make the inability of the Clark, or other cause of his refusal of him, known by intimation fixed upon the Church door: it seemeth, that in that case it is sufficient.

By the Law, The presentation unto every Church or Benefice after the same is once void, ought to be *Libera, pura, vera; si Pecunia intervenerit, non est Presentatio, aut Donatio, sed venditio*. If therefore, there shall be any covenant, contract, promise, or agreement, made with the Patron or any other: That the Patron for any sum of money, gift, reward benefit, or other consideration or thing what.

*Simonia est studi-
osa voluntas emen-
di, vel vendendi
Spiritualia, vel
Spiritualibus an-
nexa: Et dividitur
in Mentualem.
& Conventualem.*
Dodder
Moer 777.

whatsoever valuable, shall present *I. S.* to the Church or Benefice being void; although the same be made without the consent or knowledge of *I. S.* and afterwards upon such contract, covenant, or consideration, the Patron doth present *I. S.* to the Church or Benefice, and he be admitted, instituted, and inducted into the same, by the Statute of 31. *Eliz. cap. 6.* The Presentation, admission, and institution of him, are absolutely void, *ipso facto*, which were before but voidable by Deprivation: and the King shall have the Turn, and present. For the better proof of this; and to shew the several differences which are taken upon this Statute, and the exposition of the same: I shall remember unto you some special cases and presidents, adjudged in our late Books of Reports, and Records, and so put an end unto this Chapter.

Parkinson Patron of the Church of *D.* the Church being void, did contract with a stranger; For 10. *l. per an.* to be paid unto *Parkinson* the Patron, during the life of one *Kitchyn*, to present the said *Kitchyn* to the Church which was then void, which was done accordingly. And in that case it was adjudged by all the Barons in the Court of Exchequer: That although *Kitchyn* knew not of the said contract, nor was any wayes agreeing or consenting to the same; that yet he was *Symoniacè promotus*, and came in by

V. Cr. 3. pt. Smith
and Shelborns
case.

Symonie. For it was said by them, That the Statute of 31. Eliz. shall be expounded largely against Symonie and Symonists, and the very presentation, admission, institution, and induction of *Kitchyn* in that case was adjudged void.

Co. 12. pt. 101. Doctor Hutchinsons case. If any shall receive, or take money Fee, Reward, or Profit for any Presentation to a Benefice with Cure although he which is presented be not knowing of it: yet the Presentation Admission and Induction are void by the expresse word of the Statute of 31. Eliz. cap. 6.

Pa. & 1. Eliz. C. B.
Smith and Shel-
borns Case Moor
916.

If a man purchaseth the next Presentation, or avoydance to a Church, and doth not mention in certain, what person he intendeth to present when the Church shall become void, he may present any person whatsoever who is capable of the Benefice; But if a man purchaseth the next avoydance or presentation; or the next avoydance or presentation be granted unto him to present I. S. by name, be it the son, kinsman of the Patron, or of a stranger: It was adjudged *Pasc. 14. Jac. in C. B. Rot. 1026. in Pa-
liston & Benedict. Winscombs case*; That the same is Symonie, and the Clark presented comes in by Symonie, & the Patron shall lose his Turn, and the King shall present.

V. 41. El. it. Baker
and Rogers Case
adjudged. acc.
V. Cr. 1. pt. the
same Case.
V. Cr. 3. pt. 685.
the difference
where it is Sy-
mony where not.
V. M. 13. Cal. Cr.
1. pt. Byrk and
Mannings Case.

V. this Case, Mores Reports 877. The Incumbent being in apparent peril of Debt: The Patron upon a Symoniackal contract

contract for 90 *l.* granted the next avoy-
dunce to I. S. to the intent to nominate
I. R. to the Church, the Incumbent died,
I. S. nominated I. D. who was Instituted
and Inducted. It was adjudged a Symo-
niacal contract within the Statute of 31.
Eliz. and that the King should present
V. Cr. 1. p. the same Case.

If the Brother giveth money to the
Patron, to present his younger Brother,
being then a Student in the University,
the Church being then void; it was ad-
judged, *Pasc. 39. El.* in *Bushes* case: That
if the Patron doth present him accord-
ingly, that he comes in by Symonie, and
the presentation of him was utterly
void; and so it is, in case that if the Te-
stator contract by Symoniacal contract
that his Executors shall present such a
man by name to the Church, the Church
being then void: and the Testator dyeth
and his Executors do present the same
person accordingly: this also was ad-
judged to be Symonie, *Mic. 3. Jac.* in the
Common Pleas, in *Freeman* and *Englisbes*
Case: although the party presented was
not privy to the contract.

And so odious a thing is Symonie in
the eye of the Law, That if (the Church
being void) a man seeketh for money to
be presented unto the same, (although
that afterwards the Patron doth present
the same man *gratis*) it was the opinion
of *Tanfield* Lord Chief Baron in his Ar-

v. Mich. 13. J. c.
the King and Bi
shop of Norwich
and Sakes Case.
Baker 3 pt. 93.

gument of *Calvert* and *Kirchyns* case in the Exchequer; That for this Symoniacal attempt only, he is disabled to take the same Benefice, although in truth he giveth nothing unto the Patron for the same. And every incumbent who cometh in by reason of such corrupt agreement or contract, or consideration, is so disabled for ever after to be presented to the same Church; That the King himself to whom the Law giveth the presentment, in such case cannot present the same man again to the same Church: as it was holden by the Justices, in the case betwixt the King and the Bishop of *Norwich*: which case see in *Hobarts Reports* 90. For that the Statute being made for the suppression of Symonie, Symonists, and corrupt agreements, doth so bind the King in those cases, that he cannot enable him, who is disabled by the said Statute. And the party being disabled by Act of Parliament, and the same being an absolute Law, cannot be dispensed withall by any Grant of the King with a *Non obstante*, as a Law may be where a thing is prohibited *sub modo* only, upon a penalty given to the King: and if the King by a special Pardon doth Pardon the Symonie, yet that doth not make the person capable of the Benefice, who was disabled by the Statute, nor can he plead the said Pardon against the said Statute of 31. Eliz. as it was Resolved,

Mic.

Mic. 10. Jac. in the Court of Common Pleas in *Samsford* and Dr. *Hutchinsons* case.

P. 17. Jac. *Booth* and *Porters* Case, Cr. 2. pc. The Lord *Winfor* granted the next Avoydance to Dr. *G.* The Church being void *R. F.* Father of *H. F.* delt with Dr. *G.* to permit the L. *Winfor* upon a Symoniacal agreement to present *H. F.* who had no Notice of the contract, who was presented and inducted acc. The King by the Statute of 31. *El.* presented *I. S.* who at the suit of *R. F.* the Father was afterwards deprived for Misdemeanor by the High Com. After the Deprivation. The Father procured a grant of the next Avoydance to *I. N.* and procured *I. N.* to present *H. F.* the son: Resolved, That the first Presentation of *H. F.* being void, he was disabled by the Statute to accept of the same Benefice. If a man purchase an Advowson to present *I. H.* and he is not presented to it, *Qu.* if the Symonie be purged: *V.* the opinion of *Hobart* and *Warburton.* 14. Jac. in *Puliston* and *Wincombs* case.

○ If a man grants a Presentation to B. and B. makes an Obligation to the Grantor to pay him 20*l.* when the Church shall become void: It was said by *Reeve* Justice of the Common Pleas, Hil. 17. Car. to which the whole Court agreed, that this was an Obligation made upon a Symoniacal contract, and so was adjudged in one *Coals* Case; and it was said, that

V. Mic 9. Car. in
B.R. *Morkaller*
& *Todricky* case.
Cr. 1 part, 241.
257, 263.

that in that case, the Obligor could not avoid the Bond, but upon a special averment, that it was entered into upon such a Symoniacal contract: But if one present I. S. to the Church which is void, and upon the Presentation of him, he taketh an Obligation of him to resign upon request, that the Obligee may present his Son when he is of full age, to the Church, and capable of the Benefice: It was resolved in this case. Mic. 8. Jac. in B. R. in *Johns* and *Lawrences* Case, which case V. Cr. 2. part, 248. that the same was a good Obligation, and was not made upon a Symoniacal contract.

If the Church be void by Symonie by the Statute of 31. Eliz. the Ordinary is not bounden to give Notice of the Avoidance within six months after the presentment made, as it was adjudged, Mic. 8. Jac. in the Common Pleas in *Goodwins* case: For that for the most part, the contracts by Symonie are made so secret, that the Ordinary cannot have Notice of them, and the Church is void by the Act of Parliament, and therefore no notice is requisite. But if a Clark presented be deprived in the Spiritual Court, there of such Deprivation Notice ought to be given by the express words of the Statute: and so it was holden in *Baker* and *Brents* case: which Case see in Cro. 3. part 679.

Note

Note, It was resolved, Pasc. 17. Car. 1. in Sir *John Howse & Wrights Case*. Mich. 86, 89. That if a man be inducted upon a Symoniacal Contract; That the Church is void by the Statute of 31. El. to all purposes, and to all persons: as well to the Parishioners as to a stranger, who brings Trep. or *ejeltione firma* as to the King as to him who presents; and that without Deprivation or Sentence in the Ecclesiastical Court.

CAP. XIX.

Of Avoydance by Resignation: What Resignation is, and to whom to be made; And when, and where all charges of the Incumbent shall be avoided upon Resignation; and where not.

THe third means, How the Church may become void, is by Resignation, which is the Act of the party. Resignation is the voluntary yielding up of the Incumbent of his Benefice to make the Church void of his Incumbency: If it be of a Benefice with Cure of Souls, the Resignation must be made to the Bishop, who is the immediate Ordinary, by whose admittance and institution he came first into the Church: and cannot be made unto the King as Supream

Owen 12. *Gaytons*
Case.

1 H. 7 2. Imp.
103.

15 El. in C. B.
Leon 3 pt. 44.
acc.

pream Ordinary in all the Diocesses of *England*; and the reason thereof is, because that upon the Resignation the Ordinary is to give notice to the Patron of the Avoydance, to the intent that the Patron may present another to the Church; which the Bishop may do, but the King is not bounden to do.

If a Church be Donative and Exempt from Ordinary Jurisdiction, there the Resignation may be to the Patron, or a stranger, or others who have interest in the Patronage, although he be a Layperson; and if the Incumbent prove to be Heretique, &c. there not the Ordinary, but the Patron may by a Commission examine the matter, and out him, and deprive him of the Benefice. Pasc. 3. Jac. in B. R. in *Fairchild* and *Gayers Case* Yel. 61. But it was there agreed by the Justices that although the Church be Donative, yet the Ordinary may compel the Patron to collate some Clerk to the Church: For Rectoria is only exempted from the Jurisdiction, but in the Patron. If the King hath a Benefice Donative and grants the same by Letters Pat. to I. S. although the Induction and Office of the Incumbent be Spiritual: yet because he comes to it meerly by Letters Pat. he shall not be visitable, nor depriveable by the Ecclesiastical Court; but by the Chancellor of the King, or by Com. under the great Seal. *R. Co. 12. pt. 42. in Fullers Case.* If

If two Parsons do agree to premute ^{V. 10 H. 6. 32.} or change their Benefices; this can be done or perfected by any of their own Acts; but there must be a Resignation of their Benefices first made unto the Ordinary: and they must be inducted and settled therein by him: But if any Resignation be made of any other dignity or Promotion Spiritual in the Church and not of a Benefice with Cure of Souls, there to extinguish the Dignity, or Spiritual Promotion, the Resignation thereof made unto the King as Supream Patron or Ordinary is sufficient, so as it be made by fit and apt words.

Goodman Prebendary of the Prebend of ^{13 Eliz Dyer: 94} *Cory* in the Cathedral Church of *Wells*, by Deed enrolled did grant, render, and confirm unto King *Edward* the sixth, *Totam Prebendam suam de Cory, & omnia Maneria, possessiones, jura & hereditamenta quaecunque tam Spiritualia quam Temporalia, & plenam & liberam dispositionem, auctoritatem & potestatem dict. Prebend. perminentem spectantem sive incumbentem. Habend. eidem Domino Regi & Successoribus suis ad eorum proprium usum ad omnem juris effectum qui ex inde sequi poterit aut potest dicta Prebenda, & omnia jura mihi ratione ejusdem, qualitercunque acquisita (ut decet) subijcio, & submitto: It was agreed by all the Judges in this case: 1. That the^e Resignation of the Dignity made unto the King as Supream Ordinary, was good to extinguish the*

V. 10 H. 6. 32.
93 acc.

the Dignity, although the same was not made to the immediate Ordinary. 2. That those words were effectual and sufficient in Law to make a Resignation of the Prebend. 3. That by that Deed, and by those words *Canoniam sive Canonicatum*, his Spiritual function was surrendered up to the King: For by the Law *Reges sacro oleo uncti, spiritualis jurisdictionis sunt Capaces*: And again, *Res est persona mixta cum sacerdote*: and by the Canon and Common Law, Kings are capable of Tythes, Proxies, and other Spiritual things, of which other Lay-men are not capable, as is reported by Sr. John Davis in his Case of Proxies in his Irish Reports.

The words of substance in the Instrument of Resignation made unto the Ordinary, must be either *renunciare, cedere*, or *remittere*, in the case of a common person: For the word [*Resignare*] is no fit or proper word for Resignation of the Church, as it was taken by the *Civilians* in *Goodmans* case: But in case of the Dignity resigned unto the King, The words in the said Grant were holden to be sufficient to make a Resignation of the same.

The time of the Resignation is secondly considerable; and therefore if a man presented unto a Benefice with Cure of souls be admitted and instituted by the Bishop, the Church in case of a Common
per-

person is said to be full, and he may resign his Benefice; But where the King is Patron, there because that the Church is not full until Induction, he cannot resign before he be inducted: But in no case before he be inducted can he charge the Gleab; and if he be inducted, and doth charge the same: yet such charge upon his Relinquishment shall be avoided, and shall bind but only during his own time: as if a Prebendary or Parson makes a Lease for years and afterwards he resigns, the Lease for years shall be avoided. And so if a Parson or Vicar alien the Gleab of his Church; or permute or change the same, the Successor may enter. But if a Writ of Annuity be brought against a Parson, who prayeth in aid of the Patron and Ordinary & the aid is granted, and they both make default, & afterwards upon their default the Parson doth confess the Action, & then doth resign his Benefice or dyeth, this by the Common Law should have bounden the Patron, Ordinary & the Successor, because the Parson had done as much as lay in him to have freed & discharged the Gleab, by praying in aid of the Patron & Ordinary.

If a Writ of Annuity, or other Writ be brought against a Parson, or Vicar, and pendant the Writ, the Parson or Vicar resign his Parsonage or Vicarage, into the hands of the Ordinary, because the Relinquishment is the Act of the party, he shall not take advantage thereof, and abate the

Writ

T. 14 Jac. B. R.
Rudge and Tho:
mas Case Bostr.
3 pt. 202.
V. Popham 27. 7ⁿ
Fulwood and
Wards case.
12 H. 3. 8 by
Pollard.
26 H. 8. 2.
21 H. 7. 1. 6.
2 H. 4. 5.
11 H. 3. 9.

20 H. 6. 46 b.
7 H. 6. 38.
22 H. 6. 28.

4 H. 7. 2.
19 H. 6. 39.

10 H. 6. 10.

Writ brought against him : But if a Writ be brought by an incumbent of a Church, and pendant the Writ, he religas his Benefice, he shall abate his own Writ, if it be brought for any thing in the right of his Church.

11 H. 6. 2 The Abbot of Mornaby Case.

2 Mar. Dyer, 105.
10 H. 6. 11.

The Abbot of *Mornaby* brought a Writ of *Detinue* against I. S. process continued until I. S. was Outlawed, and afterwards he purchased a pardon of the Outlawry, and had a *Scire Facias* against the Abbot, and the Writ being delivered to the Sheriff, the Sheriff made his Return of it, That he could not warn the Abbot, because that before the Writ was delivered unto him, the Abbot was deposed. This by the whole Court was adjudged to be a good Return; For the deposing of the Abbot was the act of the law, and it was done before the Writ was delivered unto him : and after he was deposed he was but a Monk, and so could not be warned without his Sovereign, and the Sovereign could not be warned, because he was not a party to the first Original : But if a Writ be brought against a Parson or Vicar, and the Parson or Vicar is Deprived for some act of their own, as Incontinency, Drunkenness, &c. there the Writ shall not abate : But the successor in the Case of the Abbot if he dy, upon shewing of the matter in Court, shall abate the first Writ.

CAP.

CAP. XX.

Of Avoidance by Creation; Whether Notice be requisite thereof. From what time the six Months shall be accounted; And where Writs shall abate upon Creation, where not.

THE fourth and last means of Avoidance of the Church or Benefice with Cure, is by creating of the incumbent thereof a Bishop. For so soon as ever he is Consecrated (but not before) without any Declaratory sentence in the Spiritual Court, all his former Dignities and Benefices are *ipso facto* void; and the King (or other Patrons) shall present unto them; and if they be disturbed, they shall have *Quare Impedit Presentare ad Ecclesiam*: And the reason why the former Benefices are *ipso facto* void, is not onely for the inconveniency of Plurality, but also for that it would be very inconvenient, That one and the same man should be Subject, and Sovereign: but until Consecration, his former Benefices are not void: For although he be elected, and confirmed Bishop; yet before he be Consecrated, the King may dispense with

L him,

29 H. 8. per.
br. 116. 7 E. 4.
40. 21 E. 3. 40.
a. & b. 41 E. 3.
6. 11 H. 4. 37.
by Hill.
46 E. 3. 32.
22 H. 6. 27.
4 Ma. br. 494.
16 Eliz. Dyer
228.
11 H. 4. 38.
17. 24 E. 3. Pre-
sentment 15. If
a Prebendarie
bring *Quare*
Imp. and per-
dant the writ
he is created
Bishop; yet the
writ will lie,
and he shall
Present. 17. 22
H. 2. br. 530.
acc.
5 Ma. br. 498.
41 E. 3. 6.
11 H. 4. 213.

him, to hold all, or any of his former Dignities or Benefices in *Commendam*; and that the King hath done, and many times doth, where the Bishoprick unto which he is promoted, is but of small Revenue, and not of sufficient competence to support and maintain the Charge and Honour of a Bishop. If the Church becomes void by the Incumbents being created Bishop, the King is (by his Prerogative) to have the next presentment. *Moor* 399. *Wrights* c. 3. Cr. Sir *Rob. Basset* and *Gee's* c. p. 790. 3. Cr. 527. *Wentworth* and *Wrights*.

Of the Consecration of the incumbent Bishop, the Patron is to take notice at his peril; and the six moneths shall be accounted from the time of the Consecration, as before is said.

Consecration of the incumbent Bishop, is the act of the Law, and of the King, and not of the incumbent: And therefore, if the incumbent bringeth an Action of his own Free-hold, or Person, and afterwards (pendant the Writ) he be created Bishop, the Writ shall not abate, as the Writ shall do brought by the incumbent for any thing which doth concern his incumbency, or rectory, upon the resignation of his Benefice, which is the meer Act of the incumbent himself.

What are the Incidents to the Creation of a Bishop; How the same is done, and by whose Authority; and what acts,

44 E. 3. 9.
14 H. 8. 16.
Cook 1 part
Institut. 132.

or things a Bishop may do after he is Elected, and before he be Consecrated; and how, and by what means his Temporalities are delivered unto him, I have before declared: This only take for a conclusion of this matter of Consecration: *viz.* That as to the perfecting of an incumbent, and bringing of him into the Church, four things are required, that is to say, Presentation, Admission, Institution, and Induction. So to the promoting of an incumbent unto the Office and Dignity of a Bishop, there are four things necessary required (of which I have before spoken) *viz.* Election, which hath the resemblance of Presentation; Confirmation, which hath the resemblance of Admission; Consecration, which hath the resemblance of Institution; and Installation, or Inthronation, which hath the resemblance of Induction.

CAP. XXI.

Of Pluralities : How the incumbent is capable thereof, and by whose means he is made capable : How by the Canon-Laws, no man was capable of Plurality, and how the King might dispense with the Canon. Where, and in what Cases, and by whom, Faculties, Commendams, and Pluralities were granted before the Statutes of 21 and 25 H. 8. and 1 Eliz. Of Commendams, Recipere, and Retinere, and their difference. And of Commendams granted at this day by the Arch-bishops.

I Have briefly set forth how, and by what means a Spiritual person is capable of one Benefice with Cure of Souls; and what be the incidents to make him a perfect incumbent of the same : I have shewed also, by what acts either of the Law, or of the party, he may be deprived and put out of his Benefice after he is inducted into the same. Having thus enabled him, and set him a perfect incumbent of one Benefice ; let us now see, whe-

whether he be capable of more Benefices with Cure of souls, or of more Dignities in the Church then ones; and by what, and by whose means he is made capable thereof.

It is most certain, That by the Canon of the Church made in the Council of *Lateran*, No Ecclesiastical person whatsoever, could have holden *simul & semel*, two Benefices with Cure of souls; but upon the taking of the second, the first Benefice was void by the said Canon.

24 E.3.33. 39
E. 3. 44. Fitz.
N.B. 34. L.
Cook 4. pa. 75.
Vid. Hill 38 c.
B.R. Moor 437.
Robins and
Gerrards Case
acc.

In 26. E. 3. *Quare Impedit* 189. The King brought a *Quare Impedit*, by reason of the avoidance of a Church by a Plurality, by the said Canon. The Defendant would have demurred to the Jurisdiction, but he durst not do it, for that the same was a Spiritual thing, and tryable by the Ecclesiastical Court; wherefore he pleaded another plea, *viz.* That the Church did become void, the Temporalities being in the Kings hands.

26 E. 3. Qu.
Imp. 189.

And *vide*, and note upon the Book of 10 *Ass.* p. 4. where it is said, it may be collected out of that Book, That a Benefice of the value of 10 *l. per an.* is said to be a sufficient advancement for a Clerk.

10 Ass. p. 4.

The said Canon of the Church made in the said Council of *Lateran*, as to the matter of substance thereof, is now as it were ratified, made good, and confirmed by the Statute of 21 H. 8. c. 13. But

Note: *Cro. 3 p.* in the King and Priests Case, Resolved that the general Pardon of 21 *Jac.* did not extend to Pluralities within the Statute of 21 *H. 8.* and it was said, That although there have been many several Pardons, yet no Pluralities were conceived to be within them.

before the said Statute, the King now, and the Pope before, notwithstanding the said Ecclesiastical Canon, did by usurpation, and the King might *de jure* have dispensed with the said Canon, and might have enabled the incumbent of any Church or Benefice with Cure of souls to have taken a second Benefice, with Dispensation granted unto him; and so might the King have dispensed with any man to have holden any other Spiritual Dignity or Promotion in the Church together with his other Benefices: And the reason why the King might have dispensed with the said Canon, was, for that antiently Kings, and lay Subjects, by Licenses from the King, were the first Donors of Benefices & Ecclesiastical dignities to Ecclesiastical persons: For as one saith, the Donations were *Eleemosynas Regum & Laicorum*: & also for that such Dispensations were not repugnant to the Common Laws of the Realm: For that by the Common Law, by the taking of a second Benefice, the first Benefice was not void, but was voidable only by the said Ecclesiastical Canon; and the King, notwithstanding the said Canon, did give licence to incumbents of Churches with Cure of souls, to hold two Benefices: For we read that *Edmund* the Monk of *Bury* held many Benefices by vertue of such Dispensations: And it hath been seen (saith *Haukford*) in 11 *H. 4.* 191. That one man hath been

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been Abbot of *Glassenbury*, and Bishop of another Church *simul & semel*. Moor 547. in *Armiger* and *Hollands* Case, Resolved, by the Common Law, The first Benefice was void, at the Election of the Patron without sentence declaratory, so as he might present without Notice.

Here two Questions may materially be moved: The first, If a man be Parson of a Church Improprate, with a Vicar perpetually indowed, and he that is the Parson accepteth of a Presentation unto the Vicarige without Dispensation; Whether the same be a Plurality by the said Canon; and also by the Statute of 21 H.8.cap.13. And I conceive the Law to be, That notwithstanding that they are several Advowsons, & that several *Quare Impeditis* may be brought of them, and that several Actions may be maintained concerning their possessions: Yet I conceive, that the Presentment of one and the same man unto the Parsonage and Vicarige, neither before the said Canon, nor since, to be any Plurality: First, Because the Parsonage and Vicarige are both but one Cure; and that appeareth in the *Proviso* in the Statute of 21 H. 8. Sect. 25. the words of which *Proviso* are; Provided, that no Parsonage that hath a Vicar endowed, be taken under the name of a Benefice with Cure of souls. And secondly, Because the Parsonage and Vi-

carige are but one, the Vicarige being endowed out of the Parsonage, and a man may be his own Vicar. And of this opinion was *Hobart* Lord Chief Justice of the Court of Common Pleas, *Mich. 21 Jac. in Woodley and Mannorings Case*. But if there be two Parsons in one Church, both the Benefices above the value of 8 l. *per an.* and one dieth and the other is presented, it was adjudged it is a Plurality within 21 H. 8. *Mich. 37 Eliz. B. R. Cro. 3. p. 351. acc.*

The second Question is, Whether the Presentation of one man unto several Advowsons or Livings in one Church, each of them being of the value of 8 l. be now a Plurality or not; and I do conceive it to be no Plurality: First, Because it is out of the intent and meaning of the said Canon; the words of which are, *Plurimum potissimum Beneficia quibus animarum Cura submissa est, non sine gravi Ecclesiarum damno ab uno obtineri, cum unus in pluribus Ecclesiis rite officia persolvere aut rebus earum Curam necessariam impendere nequeat.* But in this Case, 1. The Person is not in *pluribus Ecclesiis*, but in one Church. 2. When there are several Advowsons, (as in this Case) one Parson hath not the whole Church, nor the whole cure of souls; and the words of the Statute of 21 H. 8. are, If any Parson having one Benefice with cure of souls, of the value of 8 l. accept and take another Benefice with cure of souls, &c. But in this

case, he hath not one whole Benefice, nor hath he the whole cure of souls. And as in case, If a Consolidation be made of three Churches, they are all now one incumbency, although the Advowsons be several for the Patrons to present by turns; and the Writ of *Quare Impedit* shall be *presentare ad Ecclesiam*; for now upon the matter there is but one Church, and one incumbent: So in this case, The Church upon the matter, shall be but one, and so the same is no Plurality either by the said Canon, or within the said Statute of 21 H. 8.

As the King might by the common Law, notwithstanding the said Ecclesiastical Canon, grant Dispensations to hold divers Benefices in *Commendam*: So may he do at this day, notwithstanding the Statute of 21 H. 8. For the power which the Pope had by usurpation in this Realm in granting of Faculties, Pluralities, and Commendams, &c. is absolutely now taken away by the Statute of 21 H. 8. and by the said Statute, and by the Statute of 1 Eliz. the same is transferred and settled in the King *de jure*, and from and under the King, in the Arch-bishop of *Canterbury*, his Commissaries and sufficient Deputies, who have the granting of them under him by Authority derived from the Crown. But then it is to be noted, That there is a great difference

difference between Dispensations, and Faculties granted by the Pope in ancient times, and Faculties granted by the King and Archbishop at this day. At this day, a Dispensation granted by the Arch-bishop, and confirmed by the Kings Letters Patents (as the same must be) *retinere Beneficium cum cura animarum*, is good only to such a person who is full and perfect incumbent of the Church at the time of the Dispensation to him, and is not good to him who is not incumbent at the time of the grant: but it was otherwise sometimes, where Dispensations were granted by the Pope. *Vid. M. 42 Eliz. in the Queen and Pages Case. Cro. 3. p.* in Letters of Dispensation by the Arch-bishop to a Chaplain to take two Benefices, and confirmed by the King. In the Letters of Dispensation, the words were (mentioning two Benefices to be of small value) *Unimus, annedimus, & incorporamus* the two Benefices, without the word *Dispensamus* thereof. The Court-letter is a sufficient Dispensation; for it is not necessary to have the word *Dispensamus* in them.

A Prebendary of *Salisbury* was elected Bishop of *St. Davids*, and before he was Consecrated, he obtained a Dispensation from the Pope *retinere* all his Benefices in *Commendam*, and afterwards he was Consecrated Bishop: And the better opinion of the book of 11 H. 4. 170, 213, 229, is,

is, That the King could not have a *Quare Impedit* against the Bishop for the Prebend, nor any action upon the Statute of 25 E. 3. which gave the Presentation to the King, where the Pope by Provision gave any Benefice whereof the Patronage did belong unto a Spiritual person. And by *Hauksford*, in that Case of Dispensation *retinere*, the Bishop shall not pay first-fruits; but it was there much debated, and at last agreed, That if the Dispensation *retinere* had been granted unto him after the Bishop had been Consecrated, whether the Prebend had been void, and whether any Faculty could have been granted to have enabled him to have holden the same against the King: But at this day the King *ex autoritate sua Regia qua fungitur*, may grant unto a Bishop after he is Consecrated, Dispensation *recipere & obtinere Beneficium cum cura animarum*, by presentation, institution, and induction, and to hold the same in *Commendam*; for so the Pope used to do by usurpation in this Realm; and the same power which the Pope had, is by the Acts of Parliament in 25 H. 8. and 1 Eliz. acknowledged to be in the King *de jure*.

If a man be instituted and inducted into a Benefice with Cure, of the value of 8 l. *per an.* and afterwards the King presents him to another Church, which is a Benefice with Cure, and he is admitted, and instituted, and afterwards the Archbishop

Cook 4 part,
75. in *Hollands*
Case.

Cook 4 part,
79. *Digbys*
Case.

bishop of *Canterbury* grants him Letters of Dispensation to hold two Benefices, and the King confirms the same, and afterwards he is inducted into the second Benefice, there the Dispensation comes too late; because by the institution into the second Benefice, the first Benefice was void by the Statute of 21 H. 8. But where a man is incumbent of a Church, and Parson or Vicar *de facto*, there a Dispensation *retinere* the same Benefice, upon his promotion to the Office or Dignity of a Bishop, comes time enough, as it was holden *Pasc. 3 Car.* in B.R. in *Evans* and *Ascoughs* Case: and such Dispensation, or Faculty, granted by the Archbishop his Commissary, or by the Guardian of the Spiritualities (*sede vacante*) is sufficient, although the same be not enrolled in the Chancery, or in any other the Kings Courts of Record, but onely entred in the Office of Register of the Arch-bishop. *Tr. 13 Car. Cro. 3. p. Dodson* and *Lynns* Case: The Chaplain of a Baron who had a Benefice of the value of 8 l. obtained a Dispensation, which was Confirmed under the Great Seal, to accept another Benefice *modo fit* within 10 Miles of the former: He accepted a second Benefice 17 Miles distant from the former, but both within one Diocess. The Question was, if the words *Modo fit* was a Condition within the License of Dispensation: Resolved it was not.

7 Eliz. Dyer
233.

Moore 12. Agay
and Bishop of
Peterboroughs
Case.

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The Corporation of Kilkenny in Ire-
land were Patrons of a Vicarige within
the Diocess of Ossory, and presented A.
unto the same, who was admitted, insti-
tuted, and inducted; and during the life
of the incumbent, the Church being full,
the Arch-bishop of Dublin granted unto
I. S. then Bishop of Ossory, that *unum vel
plura Beneficia, curata vel non curata,
retinere possit perpetua Commenda titulo*:
which was confirmed by the Kings Let-
ters Patents. A. died, and the Church
was void by six moneths; And the Bi-
shop of Ossory by vertue of the same Dis-
pensation did retain the Vicarige in *Com-
mendam*; and it was holden there by
many good Lawyers, That the Faculty
was well executed to the Bishop by his
acceptance, without a Presentation, Insti-
tution, and Induction into the same: for
it was said, That those Ceremonies were
not necessary for the conferring of the
Vicarige to the Bishop, because the same
might have been done by other ways,
viz. by union or appropriation; for so
it was in *Gremonds* case, which see Mr.
Plowdens Comment. 500. But *quere* of
that Case; for it was not adjudged:
and the Bishop was not the present in-
cumbent of the Church, and so the *Com-
mendam retinere*, as before is said, void,
according to the opinion delivered in
Co. 4. part, in *Hollands* Case. And yet
vid. *Trinit. 11 Jacobi* in Co. B. the
Case

*Vi. the case of
Commend. in
Sir Job. Davies
Reports.*

Vi. & Lege
Colt and the
Bishop of Co-
ventries Case
at large re-
ported in Ho-
barts reports,
from f. 140,
to 163.

Case between *Colt* and the Bishop of *Coventry* and *Lichfield*, where such a Dispensation granted by the Dean and Chapter, Guardians of the spiritualties (*sede vacante*) of the Arch-bishop to the Bishop of *Coventry* and *Lichfield*, retinere any Benefice under the value of two hundred marks *per an.* in *Commendam*; and that he might hold the same without any Presentation, Admission or Institution, was pleaded by the Bishop, and the plea holden to be good: but *Quere.*

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CAP. XXII.

Who may be dispensed withal to have Plurality within 21 H. 8. Of Reteiner of Chaplains, and how many Chaplains Noble-Men and Officers of Honour and Place may Retein: What shall be a good Reteiner of a Chaplain: and where Dispensation granted to such Chaplain for Plurality shall be good, where not.

WHat persons are capable of Pluralities, and what to grant them at this day, and what not, appears by the Statute of 21 H. 8. cap. 13.

The King, Queen, Prince, and other the Kings children are not limited within the Statute how many Chaplains they shall retein: and therefore they may retein as many Chaplains as they please; and every of their Chaplains may purchase a Dispensation to purchase a Plurality. But Arch-bishops, Bishops, Dukes, Marquesses, Earls, Countesses, Barons, and all other Officers of Honour and Dignity mentioned in the Statute, are stinted how many Chaplains every of

of them may retein, who are capable to have plurality: And the retainer of such their Chaplains, must be *sub signo & sigillo* of the said King, Lord, &c. otherwise the same is not good, as it was Resolved, 28 Eliz. in *Savacres* Case. But it seems the King may retein a Chaplain by parol only, 3 Co. 424. *Whetston* vers. *Higford*. And so it seems in the case of the Nobility, &c. *Moor* 277.

Cook 4. part,
90. *Druries*
Case.

A Countess may retein two Chaplains within the Statute, and each of them may purchase Dispensation to have and hold two Benefices with Cure of Souls. But if a Countess, who is a Widow doth retein two Chaplains, and afterwards doth retain a third Chaplain, and the third Chaplain doth before any of the other two, purchase a Dispensation to hold two Benefices with Cure, his first Benefice being of the clear value of 8 l. the first Benefice is void by the Statute. For that, when the Countess hath retained two Chaplains, those two are only capable of Dispensation within the Statute, and the Retainer of the third Chaplain cannot devest the capacity of Dispensation which was vested by their Retainer in the two first Chaplains: and therefore the Dispensation purchased by the third Chaplain is void, and comes too late to make him capable of Plurality, and so his first Benefice is void by the Statute.

18 Eliz. Dyer
312.

If a Baron, who is allowed but three Chap-

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Chaplains, doth retein fix by his Letters Testimonial under his hand and seal at one time; and all six of them are preferred to fix several pluralities; the three first Chaplains are only warranted by the Statute, and Dispensation for pluralities purchased by them, onely is good; and the three last shall not be reputed his Chaplains within the Statute, so long as the first three are in his service, or are living; and therefore the purchase of Dispensation by the three last for pluralities are meerly void.

If a Baron doth retein three Chaplains according to the Statute, and each of them purchaseth a Dispensation for plurality, and are advanced according to the Statute: if the Baron afterwards discharge one of them of his service, he cannot retein another during the life of him that is discharged; for then the Statute should be defrauded, and he might advance Chaplains without number.

If a Countess that is a Widow, doth retein a Chaplain, and he purchaseth a Dispensation for plurality, and afterward the Countess enter-marrieth with a Peer of the Realm, and afterwards the Chaplain is admitted, Instituted and Inducted into a second Benefice with cure: This is well, and good in Law; for that the Reteiner was countermanded by the enter-marriage: But if an Earl or Baron reteineth a Chaplain,

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Co. 4 part. 9.

17. Pasch. 29.

El. C. B. St.

vacres Case.

Co. 4 p. 60.

Pasc. 28 El. 17.

Co. B. Rot.

1130. Savarres

Case, acc.

Co. 4 part. 113.

Altons Case.

co. 4. part. 119.
The Countess
of Westmerlands
Case.

and before he be advanced unto any Benefice, the Earl or Baron be attainted, now is the Retainer thereby determined before the Dispensation obtained; and therefore if such a Parson having a Benefice with cure of Souls, of the value of 8 l. *per an.* doth afterwards without other Dispensation obtained, take another Benefice, the first Benefice is void by the Statute.

The Statute of 21 H. 8. cap. 13. shall be construed largely against pluralities, as being prejudicial to the service of God, and the instruction of the people. And therefore if a Bishop be translated, and made an Arch-bishop, and holdeth both Dignities, or a Baron being created an Earl, although he hath both the Dignities and Honours conjoynd in one person; yet shall he have but so many Chaplains, as an Arch-bishop or Earl may have, who shall be capable of Dispensation to have two Benefices with Cure within the Statute.

18 Eliz. Dyer
347.

If a man long before the making of the Statute of 21 H. 8. hath a Dispensation from the Pope for a Plurality; and at the time of the making of the Statute of 21 H. 8. hath one Benefice with Cure of Souls of the yearly value of 8 l. *per an.* and within one year after the making of the Statute of 28 H. 8. cap. 16. he obtaineth a Confirmation of his former Dispensation, with words in the

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the Confirmation, To hold, use, and enjoy the effect of his Dispensation; yet by the opinions of *Mounson* and *Manwood* Justices, the first Benefice is void by the Statute of 21 H. 8. and the Statute of 21 H. 8. cap. 16. doth not restore him to the same without a new Presentation, notwithstanding that the Statute of 28 H. 8. made the Bulls of Dispensation made by the Pope good for one year; and if they be surrendered, That the Chancellor of the Augmentation may make a new Dispensation unto him. But by *Dyer* Justice, as the Statute of 21 H. 8. made the first Benefice void: So the Statute of 28 H. 8. cap. 16. did restore him to the Benefice; for when two Statutes are cross in appearance the one to the other, and no Clause of *Non obstante* be contained in the second Statute, so that the one may stand with the other, such construction shall be made of the Statutes, that both of them shall take effect.

The Statute of 21 H. 8. would not that there should be a parity or equality of all persons in the pale of the Church; *Nihil enim est majus inaequale quam Aequalitas.* And therefore the Statute provided that some Ministers and Ecclesiastical persons should have precedency of others; 1. In respect of the persons of Dignity upon whom they were attendants. 2. In respect of their births and bloods. 3. In respect of their De-

Tr. 11 Jac. in
Co.B. The Bishop
of Exeter and
Sir Hen. Wal-
lops Case ad-
judged, acc.

degrees which they have taken within the two Universities of this Realm: and therefore 1. The Chaplains of the King, Queen, Prince, and their children, may have as many Benefices with Cure of Souls, as it shall please the King, Queen, or their children to confer upon them, of any value whatsoever. So every Archbishop may have eight Chaplains, because he must use eight at the Consecration of every Bishop: every other Bishop four Chaplains: every Duke, Dutches, Marquess, Earl, Countess, Baron, or Baroness Dowager two Chaplains: every Knight of the Garter three Chaplains, and every one of their Chaplains may purchase a Dispensation to have and hold a Plurality of two Benefices of Cure of Souls of any value whatsoever. So 2. The Brethren and Sons of all Temporal Lords born in Wedlock, may have License or Dispensation to take and keep as many Benefices as the Chaplains of a Duke, or Arch-bishop: the Sons and Brethren of every Knight may purchase Dispensation to receive and take two Benefices with Cure of Souls. 3. In respect of their Degrees: So all Doctors and Batchelors of Divinity, Doctors of Law, and Batchelors of the Canon-Law, who are admitted to their Degrees by the Universities, and not of Grace, may purchase License or Dispensation to have and keep two Benefices with Cure of Souls.

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Souls. Inſomuch that if we conſider of the Nobility now in *England*, the Offices of Honour and Place, the Sons and Brethren of Noble-men and Knights, and other deſerving men within the Realm who have taken the Degrees aforeſaid, it cannot be thought but that all, or the moſt part of the Clergy-men within the Realm of *England*, have at this day, or may have Plurality, or two Benefices with Cure of Souls, within the ſaid Statute of 21 H. 8. Again, if we look upon the Parochial Churches within the Realm; the Dignities of Arch-deaconries, Deaneries, Prebendaries, and other Eccleſiaſtical Dignities and Promotions given to perſons within the Realm; it cannot be imagined, but that all Scholars, Miniſters, and other Eccleſiaſtical perſons within the Realm, of Learning and Merit, are now better provided for by this Law of 21 H. 8. then they were in ancient times, when Diſpenſations for Pluralities, Commendams, and Faculties were granted, and obtained by the Clergy of *England* from the Biſhop of *Rome*.

CAP. XXIII.

What Right or Interest the Parson or Vicar have to the Church : Of the Rights of the Patron and Ordinary : In whom the Fee-simple of the Gleab of the Parsonage and Vicarige is : Who shall be said to be the Patron of a Vicarige endowed : What Actions the Parson and Vicar may have for the Freehold of the Church and Gleab. And whether a Juris utrum will lie by the Vicar against the Parson for the Gleab of the Vicarige.

BY degrees I have brought the Clerk presented not only into the real possession of one Church or Benefice with Cure ; but have shewed unto you, that if he be Qualified within the Statute of 21 H. 8. how that he may purchase License or Dispensation to take and receive plurality, or two Benefices with cure of Souls.

Now it remaineth that I do declare unto you, what Right or Interest the Parson or Vicar have in the Church or Gleab-

Gleab-Lands after their Inductions into the same, and what Right and Interest the Patron and Ordinary likewise have in the same.

Their Rights unto the Advowson, and to the Church, and Gleab-Lands thereunto belonging, are of several Natures. The Parson or Vicar hath *Jus Possessionis*, a right unto the possession of the Church and Gleab; for that the Parson hath in himself the Freehold, and is to receive the profits of the Church and Gleab, and the Oblations, Tythes and Offerings, to his own use. The Patron hath *Jus Presentationis*, the right of presentation of his Clerk unto the Ordinary to be admitted, Instituted and Inducted into the Church. The right of the Ordinary is *Jus Ordinationis*, a right of enabling and investiture of the Incumbent, and to see the Cure to be served: The Parson hath *Jus habendi*, *Jus retinendi*, *Jus possidendi*: He may have, possess and retain the Profits, Tythes, Obventions and Offerings to his own use, without the Patrons and Ordinaries consent, and nothing can be done by them during his incumbency to charge the Church, or his Successor, without his consent and agreement: But the Rights of the Patron and Ordinary are only collateral Rights; for that none of them can have, retain, or possess the Church or Gleab themselves: And yet the Patron and Ordinary have *Jus disponendi*,

12 H. 8. 7.
19 H. 6. 75.
29 H. 6. 3. & 8.
39 H. 6. 40.
p. 14.
28 H. 6. 1. & 2.

Vid. 9 H. 6. 3.
by Patron and
Rabington, acc.

16 E. 3.
Annuity, 24.
20 E. 3. An-
nuity, 32.
7 E. 4. 40.
40 E. 3. 30.
Cook 1 part,
Instit. 343.
Vid. 5 E. 6.
Dyer 109. A
Parson makes a
Lease for years
to begin after
his death: the
Patron and Or-
dinary Confirm it; it is a good Lease, and shall binde the Successor be-
ing a present Charge. Vid. 19 H. 6. 75. where a Recovery is against
the Parson by Action tried, the Successor will not falsifie the Recovery
by Averment, but by Error, or attainr adjudged.

ponendi; a kinde of Disposition in the Church. For that no charge could have been laid upon the Church in perpetuity to have bounden the Successors of the Parson, unless the Patron and Ordinary had agreed thereunto. And therefore, if a Writ of Annuity had been brought against the Parson, and he had prayed in aid of the Patron and Ordinary, and the Patron had made default, and the Ordinary had appeared and confessed the action; Or if the Ordinary had made default, and the Patron had confessed the action; this should not have bounden the Parson or his Successor. But if they had both appeared and pleaded nothing, by the common Law this should have bounden the Church in perpetuity, for that *Qui tacet consentire videtur*. But if the Parson himself, with the consent only of the Ordinary, had granted unto another man an Annuity out of the Gleab, having *quid pro quo*, in consideration thereof; This should have bounden the Successor of the Parson at the common Law without the consent of the Patron. Also in some Cases the Action of the Patron himself alone would have bounden the Incumbent: and therefore if a recovery had been by action tried against the Patron where the

Right

Cap. XXIII. Parsons Law.

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Right of the Patronage had been in question, there the present Incumbent should not have put the Right again in trial, but he should have been bounden thereby by the common Law; nor was he helped herein by the Statute of 25 E. 3. cap. 7. if the Patron had not pleaded faintly; but the Parson should have been bounden by the Judgement: yet by the opinion of Mr. Fitzherbert, in his *Natura Brevium* 49. a. saith that the Successor of the Parson, after such a Recovery had against his Predecessor by action tried, might have had a Writ of *Juris utrum*, notwithstanding such Recovery: *vid.* 7 H. 6. 36. That the Parson shall not have a Writ to the Bishop, if it be found for him, if the Patron made default: But the Parson himself, as I said before, hath the Freehold in him, and hath the Right of the Church, Church-yard and Gleab in him: of which, if he be put out of possession, or disseized, he may have an Assize: *vide* to that purpose 28 H. 6. 19. by *Markham*: if the Parson be ejected, he shall have Trespass, or he may have an Assize if disseized of his Church-yard: and so also may the Vicar have against a stranger if he be disseized thereof, but not against the Parson himself: as the Book of 13 R. 2. *Fitz.* tit. Jurisdiction 19, is: For it is agreed in 11 H. 4. 12. That of such things as are annexed unto the Church or Gleab, or for cutting down of the Trees, or doing

38 E. 3. br.

24. Imp. 66.

38 E. 3. 31.

acc. adjudged.

Vid. Cook 6 p.

8. in *Ferrers*

Case, acc.

11 H. 6. 4. by

Danby.

17 H. 3. Pro-
hib. 26.

11 H. 4. 12.
acc.

8 H. 7. 12.

doing of Trespass in the Church-yard, or Gleab, the Parson shall have an Assize, or an action of Trespass; for that the Right and Interest of them is in the Parson. But for the Ornaments of the Church, or for the Bells in the Steeple, the Parson shall not have the Action if they be taken away, but the Church-wardens.

If a Seat be set in the Church, and afterwards the same be taken away by a stranger, the Parson shall not have the Action: and the reason thereof is, because the same is not fixed to the Freehold; but in such case the Action is given to the Church-wardens, or to the party unto whom the Seat doth belong and appertain.

If the Coat-Armour, Pendants of Arms, or Scutcheons of Arms of any Noble-man, or Gentleman, that are hung in the Chancel, or in the body of the Church, in honour of the party buried there, be taken down, or carried away by the Parson or Vicar, an action will lie against them by the Heir or Executor of the party deceased: For these are no Oblations that belong to the Freehold of the Church: But such is the Interest of the Parson in the Freehold, and Gleab of his Church, as before is said, that he shall and may have an Assize thereof: and if he be impleaded in any Action real of the Freehold, he shall have aid of the Patron and Ordinary.

In *Dantree* and
Deas Case, 17
Jac. *Bridgman*
5.

But

But the Free-hold being in the Parson, it hath been much controverted in our Books, in whom the Fee-simple of the Gleab of the Parsonage and the Vicarige is. 1. Some authorities are, and some are of opinion, That the Parson hath the Fee-simple of the Gleab in him, and that for these reasons, viz. 1. They say, That a Parson is a Spiritual Corporation, and Lands may be given unto him in Frankalmoigne; and every gift in Frankalmoigne setteth the Fee-simple in the Donee, and supposeth a Fee-simple to pass. 2. They say, That the Parson hath brought a Writ of Right in the nature of a *Quod permittat* of a Common, and counted that he was seised in fee & droit, and the Writ hath been admitted good by the judgement of the Court: see to that purpose 31 E. 3. Fitz. *Quod permittat*, 8. and Fitz. *Natura brevium*, 50. R. See also *Temps E. 1.* title *Quod permittat*, 9. where a Parson brought a *Quod permittat* of the seisin of his predecessor of Estovers, and counted of a seisin in fee, and joyned the mise upon the meer right: And it is said by *Paston* in 8 H. 6. 24. That a Parson may joyn the mise upon the meer right; If the Parson dieth, the freehold of the Gleab is not in the Patron; neither can any Action be brought for the Gleab until there be another Parson: And it is the better opinion of the Book of 8 H. 6. 24. That it a *Precipe quod reddat*, wrong.

32 E. 3. *Juris utrum*, 14.

Br. Battaille 13. acc.

Vid. 9 H. 5. 13.

In a Writ of Entry in the Quibus in nature of a Disseisin brought against a Parson, he shall not have aid of the Patron and Ordinary, because the Writ supposeth that he is in by Force and

But

9 E.3. *Juris*
utrum 18.

Vid. 9 H.5. 14.
By *Halls* ac-
cordant.

Vid. Litt. 144.
Self. 647, acc.
Vid. 21 H. 7.
41. Release to
the Patron and
Ordinary in the
time of vacati-
on, is a good
extinguishment
of an Annuity :
for the Ordinary
shall take the
profits tempore
vacationis. 7 E.
4. 12. 20 Eliz.
in Co. B. Harris
Case adjudged,
acc.

dat, or a *Scire Facias* to execute a reco-
very in a Writ of *Cessavit*, he shall not
have aid. 3. They say, That if the Par-
son doth make a Lease for his own life
of any part of the Gleab, that he hath a
reversion in him; and may be vouched :
and this appeareth by the Book of 9 E. 3.
Fitz. title Aid. 19. Where in a *Forme-*
don brought against I. S. the Tenant
pleaded, That *W.* was Vicar of the Church
of S. and made a Lease to him for life,
and vouched the Vicar, who entred into
warranty, and pleaded, That he found the
Church seised of the Lands as parcel of
the Gleab of the Vicarige; and that A.
was Parson of the Church, and prayed in
aid of him, and the aid was granted : by
which case, say they, it appeareth, that
Voucher and Aid-prayer shall be had a-
gainst a Parson. 4. They say, That the
Fee-simple is in the Parson, and not in
the Patron; for that the words of the
Writ of *Juris utrum* are, *Utrum sit libera*
Eleemosyna Ecclesie de D. and not of the
Patron. But notwithstanding these rea-
sons and authorities above mentioned, I
conceive the Law to be, that the parson
hath not the absolute Fee-simple of the
Gleab in him, and at the least, but a qua-
lified Fee-simple; and that the absolute
Fee-simple of it, according to the opinion
of Mr. *Littleton*, is in abeyance, or in
Nubibus; that is to say, in the intend-
ment, or consideration of the Law :
and

and it was provided, that it should be so by the wisdom and policy of the Law, that the Parson and Vicar, who have *curam animarum*, and are bound to celebrate divine Service, administer the Sacraments, and the like, might have somewhat to live upon; and therefore the Law provided that the Fee-simple of the Gleab should not be in them, but rather out of them, that no alteration or discontinuance thereof by the present incumbent might be a bar unto the Successors, and so leave them destitute without a convenient maintenance. And for that they could not by the wisdom and policy provided as aforesaid, alien or discontinue the Gleab-lands (for any discontinuance did give a fee) it necessarily followeth, that the absolute Fee-simple of the Gleab was not in them: Neither could the Parson have or maintain a Writ of Right of Advowson, or other Writ grounded upon the meer Right: which is a manifest proof that he hath not the absolute Fee-simple of the Gleab in him.

An Assise of *Novel disseisin* was brought 43 Aff. 13. against a Parson of part of his Gleab-lands: he pleaded, That he was presented to the Church by the King, and prayed an Aid of the King, and the Aid was granted: and Aid shall never be granted to one who hath the absolute Fee-simple of the Lands in him.

If

9 E.3. *Juris*
utrum 18.

Vid. 9 H.3. 14.
By Halls ac-
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Vid. Litt. 144.
Sect. 64^r, acc.

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If

8 H. 6. 26.

19 H. 6. 39.

10 H. 6. 5.

Cook 6. part in

Ferrers Case.

Vid. Lit. sect.
646.31 H. 6. 13.
by Silverton.9 Aff. 3.
40 E. 3. 27.8 Aff. 36.
15 Aff. 8. acc.

If a Writ of Right be brought against a Parson, and after the mise is joyned he makes default, and judgement be given against him upon his default; this shall not binde the successor, but the successor shall have a *Juris utrum*, because the Parson did not pray in Aid of the Patron and Ordinary; and he had not the meer Right in him to lose by his default; and in that case, the Parson himself might have had a Writ of *Juris utrum*, notwithstanding the bar in the former action; for that is his Writ of Right, and a Writ of the highest nature that a Parson can have.

Vicariges were originally endowed out of Parsonages, and the Vicar was to have aid of the Parson if he were impleaded for any thing which concerned his Vicarige, and the Parson was subject to every charge of the Vicarige; and the Vicarige in antient time was not esteemed the Tenant of the Freehold of the Gleab of the Vicarige, but the Freehold thereof was in the Parson, and the Vicar himself was not such a Parson against whom the Lands of the Vicarige could be demanded; neither did any *Precipe* lie against him as Vicar, nor could he maintain an Assize in his own name.

12 E. 3. Fitz. tit. Brief. 256. in an Assize brought against a Vicar, he pleaded, that he had nothing but as Vicar, and demanded judgement of the Writ; the

Plain-

Plaintiff said, That he was seised until he was disseised by him, and that it was holden, that if he had found the Vicarige seised, that then it was a good plea: But in that case it was holden and agreed, That a Vicar should not have an Assize in his own name: But yet I finde in 4 E.3. title Brief. 704. a Writ of Intrusion was brought against a Vicar, who pleaded unto the Writ, That the Freehold was in the Parson; and notwithstanding that plea, the Writ did not abate. But the reason of that case might be, for that the Intrusion was a tortious act, and a personal wrong; and therefore the person of the Vicar was charged therein and therewith: and yet in that case, the Vicar had aid of the Parson and Ordinary; by which it appeareth that the Freehold was in the Vicar himself, but not the Fee-simple of the Gleab of the Vicarige: And I hold the Law to be, That the Freehold of the Gleab of the Vicarige is in the Vicar himself, and not in the Parson; for that the possessions of the Vicar and Parson are severed, and every of them shall have several Writs concerning the Rights which do appertain unto them, and shall not joyn in one Writ; and they shall pay their Tenths and other charges liable upon their several Gleab-lands severally by themselves; and the Vicar at this day shall have and maintain a Writ of *Juris utrum* against the Parson, who is the Patron

Vid. in Britton and Wades Case, Cro. 2. p. 516, 517, 518. The Parsonage and Vicarige are distinct Benefices, and both have curam animarum; the Parson habitualiter, the Vicar actualiter.

Vi. 40 E.3. 25.

Patron of the Gleab of the Vicarige for the same Gleab: by all which it appeareth unto me, that the Freehold thereof is in the Vicar upon his first endowment; and that for the absolute Fee-simple of the Gleab of the Vicarige, the same is in the Intendment and Consideration of the Law *in Nubibus*, as the Fee-simple of the Gleab of the Parsonage, as in Case of the Parson, as before is said.

Before I conclude this Chapter, it will not be impertinent concerning the Right of Patronage to determine a Question made in our Books, which is this, *viz.* If there be a Parson and Vicar endowed in one Church, and the Vicarige becomes void, who shall be said to be the Patron of the Vicarige? whether the Patron of the Parsonage, or the Parson? In 17 E. 3. 51. Some of the Judges are of opinion, That the Advowson of the Vicarige doth appertain to the Parson; others that it belongeth to the first Patron: and the Court is divided in opinion, Mic. 16 E. 3. Fitz. Qu. Imp. 145, by *Parvinge* and *Hill*, they encline that it is in the Patron; for there they say, that the Ordinary cannot make a Vicar without the Assent of the Patron. 5 E. 2. Qu. Imp. 165. puts the Case, that although the Vicarige be endowed with the Assent of the Patron and Ordinary, yet the Advowson of the Vicarige doth remain in the Parson, because the same is parcel of

of the Advowson of the Parsonage.

16 E. 3. Grants 56, it was a Question, if by the Grant of the Advowson of the Church, the Advowson of the Vicarage did by-pass; and there it is said by *Stone*, that it doth pass as incident to the Parsonage.

17 E. 3.
Grants 66.
13 R. 2. Jurisdiction 19.
16 E. 3.
Mans defaults
166.

In Mic. 31 Eliz. in Co. B there was a Case between *Ashgell* and *Dennis*, which was this, viz. The King was seized of the Rectory of D. and of the Advowson of the Vicarage of D. and by his Letters granted to I. S. *Rectoriam prædictam cum pertinentiis, ac etiam Vicariam Ecclesie prædictæ*. In that Case, it was resolved by all the Justices of the said Court, That by those words, the Advowson of the Vicarage did not pass: But if the King had granted *Ecclesiam suam de D.* the Advowson of the Vicarage had passed.

Mic. 31 Eliz.
C. B. *Ashgell*
and *Dennis*
Case. *Vid.*
Leon. Reports,
Rep. 1. p. 191:

Tr. 29 Eliz. C. B. Sir *Tho. Gorge* and *Dartons* Case. *Leon* 3 p 196. The King seized of a Mannor to which an Advowson is appendant: the King grants the Mannor with the Advowson to I. S. Resolved, the presentment did not pass, though the King by his Prerogative may grant a thing in Action. *Vid.* 13 Eliz. *Dyer* 300. acc.

31 H. 6. 13, and 14. by *Hengiston*, The Parsonage and Vicarage are all but one, and he who is Patron of the Parsonage, is Patron of the Vicarage; and *Fortescue* there doth agree the same: But notwithstanding

24 E. 3. Qu.
Imp. 22. If
the Vicarige
void, although
the Parson be
made a Bishop,
yet he shall pre-
sent.

standing those Authorities, I conceive first, that *de jure*, the Parson is Patron of the Vicarige, unless upon the Endowment by the Ordinary it be otherwise provided: and so saith Mr. Fitzherbert in his N. B. 33. That the presentation to the Vicarige doth belong unto the Parson of Common Right, if it be not otherwise agreed unto. 2 H. 3. Grants 89. and Perkins 123. If a man grant by Fine the Parsonage, saving the presentation to the Vicarige, it is a good saving, and the Parson shall present when the same is void. 2. Common Experience is, that where there is an Appropriation, and a Vicar endowed, that the persons to whom the Appropriation was made, were always accounted Patrons of the Vicarige. And 50 E. 3. 26. an Abbot who had an Advowson appropriate, upon which there was a Vicarige endowed, did present unto the Vicarige: wherewith agreeth the Book 17 E. 2. Qu. Imp. 178. 3. It is manifest by reason: for as the patronage of the Church doth appertain unto him who was the first Founder of the Church, and endowed the same with Lands. Note: Pasc. 4 Jac. in B. K. in Green and Austins Case, acc. *quod modo sequitur*, That the payment of Tythes to the Parson is a discharge sufficient against the Vicar; because of common right all Tythes are due to the Parson, and the Vicarige is derived out of the parsonage, so as no Tythes belong

long to the Vicar, but only by Endowment, or Prescription, *Yel. 86.* So in regard that the Endowment of the Vicarige is taken out of the Parsonage, and out of the estate of the Parson, and if he be impleaded of his Gleab, he shall have aid of the Parson: and also if the Vicarige be diminished, the Ordinary may increase the Endowment of it out of the Parsonage, as the Book of *31 H. 6. 13.* is; it is but reason that the Parson have the patronage of it. *M. 7 Jac. Staffords Case. Lea 14.* If a Vicarage be Endowed out of a Parsonage, and the Parsonage becomes poor, and not sufficient to maintain the Parson, and the Endowment of the Vicarige be united or appropriated to the parsonage, by the parties who have Interest in the same, and the Parson findes one to serve the Cure, the Endowment of the Vicarige is thereby destroyed, and a presentation to the Vicarige is void, and will not carry the first Endowment. Again, the Vicar is Substitute to the Parson, and his Endowment at the first either of Lands or other things was onely as a maintenance for him, in officiating the Cure for the ease of the Parson; and also that it belongeth to the Parson to see that there be a fit able and honest man, of whose Care, Ability, and Learning he may be assured, sufficient to Officiate the Cure; Therefore it standeth with good reason, that the Parson be his Patron, and

present such a one to the Vicarige as shall be sufficient, and of ability to serve the Cure: And therefore, notwithstanding the former Authorities, I conceive, that the Patronage of the Vicarige doth *de jure* belong unto the Parson, and not to the first Patron of the Parsonage Appropriate.

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CAP. XXIV.

Of Usurpation, and where the same shall put the Rightful Patron out of the possession of the Church, or his Advowson; where not.

I Have in the former Chapter considered the Rights of the Patron and Ordinary, and of the Incumbent, and what remedy the Incumbent hath, if he be ousted, or disseized of his Church, or Gleab-Lands. Let us now return to the Patron, and see by what, and whose acts the Patron may be ousted of his Advowson, or presentation to the Church. I said before, that Patrons might be put out of their Advowsons by Disseizins, Discontinuance of the Mannors or Lands to which the Advowsons were Appendants, and by Usurpations, of Disseizins, and of the Discontinuance of the Mannors and Lands, and where the Patron shall present before his entry, or that he re-continueth the Mannors, &c. I have shewed in a former Chapter. I shall in this set out and declare where an Usurpation shall put the rightful Patron out of the possession of the Church, or Advowson; where not.

Usurpation is where a stranger who hath no title to the Advowson, the Church being void, doth present his Clark to the Bishop or Ordinary, and the Ordinary doth thereupon admit and institute the Clark presented to the Church which is then void: this presentation is a Disturbance and Usurpation, and doth put the Rightful Patron out of the possession of the Church. And this appeareth by the Statute of *Westm.* 2. cap. 5. *Cum aliquis jus presentandi non habens, presentaverit ad aliquam Ecclesiam, cuius Presentatus sit admissus.* For no man can be put out of the possession of an Advowson, but upon Admission and Institution, upon a presentation only. For if a Bishop doth Collate unto the Church without title, and his Clark be Inducted, this doth not put the Rightful Patron out of possession, as it was adjudged, *Mic. 30 Eliz. in Co Banco, in Jourdens Case*: For that it shall be taken only to be provisionally made for the Celebration of Divine Service, until the Patron doth present. *Viñ. M. 21 Jac. Dalton and Bishop of Ely's Case*, Resolved; If a Bishop suffer an Usurpation, and dies, the Successor may procure a *Quare Impedit*; and so if a Bishop purchaser of an Advowson suffer the Usurpation and dies, the Successor shall have a *Quare Impedit*. *Lea 80. Cro. 2 part,* the same Case.

14 H.7. 2. acc.

Pasf.

Pasc. 30 Eliz. in Co. B. in the Case between the Queen and the Bishop of York, it was holden by all the Justices thus; That Collation cannot gain any patronage, and cannot be an Usurpation in the case of a common person; *a fortiori*, not against the King: and there it was said, that Collation was the giving of the Church to the Parson; Presentation is the offering of the Parson to the Church: And *vid.* 35 H. 6. 61. The King may gain a presentment, by wrong, although he may not properly be said to be an Usurper or a Disseizor.

At the Common Law, every presentation to the Church did put the Rightful Patron out of possession of it, and put him to his Writ of Right of Advowson; whether the presentation was by title, or without title: and therefore at the Common Law, if *A.* being seized of a Manor to which an Advowson was appendant, had levied a Fine thereof to *B.* and his heirs, and afterwards the Church had become void, and *A.* had afterwards presented by Usurpation his Clerk to the Ordinary, who had been admitted, Instituted, and Inducted; this should have put the Patron out of possession: and therewith agreeth the Book of 8 E. *Qu. Imp.* 25. and there it is said, that the party must traverse the presentment, and not the Appendancy; for the presentment by the Usurpation put him out of pos-

Pasc. 30 Eliz.
C. B. the
Queen and
Bishop of
York's case. *Leo.*
Rep. 226.
Tr. 33 Eliz.
Cro. 1 par.
Top Queen and
Bucks case
a Judge, acc.

8 E. 2. Qu. Im-
pedit. 168.

8 E. 3. Qu.
Imp. 25.
V. 22. H. 6. 85.
21 E. 4. acc.

45 E. 3. Qu.
Imp. 139.

Cook 1 part,
Instit. 238.

44 E. 3. Qu.
Imp. 139. acc.

31 E. 1. Qu.
Imp. 185.

6 E. 3. 28.

39 E. 3. 24.

43 E. 3. 15.

50 E. 3. 13. b.

session, which is the principal matter of title: And so it was, if *A.* had recovered against *B.* an Advowson in a Writ of Right of Advowson, and had final Judgement, and afterwards the Incumbent had died, and *B.* by Usurpation had presented his Clark to the Church, who had been admitted and instituted, and afterwards *B.* had died, this should put *A.* out of possession, and the heir of *B.* should not have been bounden by the Judgement, either in blood or estate but he should have presented: and the reason of both the said cases was, because every presentation did put the Lawful Patron out of possession; and therefore albeit in both the said cases, the Usurpation was before Execution: yet the Rightful Patron was thereby put out of possession of his Church, and the Usurper had gained the inheritance of the Advowson thereby, and the presentment of the Rightful Patron *pro hac vice*, lost for ever.

At the Common Law, if an Usurpation had been made upon an Infant, or a *Feme Covert*, they had been put out of possession, and had been put to their Writs of Right of Advowson; and the reason thereof was, because (it was said) the Incumbent came in by judicial act of the Ordinary, viz. by Admission and Institution; and it was presumed, that the Ordinary would not have done any wrong,

wrong, or have assented to any wrong to have been done, which might be to the prejudice of the Church: and so it was, if they had purchased an Advowson, and an Usurpation had not been upon them during their infancy or coverture, it had put them out of possession, and they had not been helped by the Statute of *West. 2. cap. 5.* But *F. B. 34.* S. otherwise it is if the Feme have the Advowson by descent. But yet at the Common Law, if one had usurped upon the possession of the King, and his Clark had been admitted, Instituted and Inducted, this should not have put the King out of possession of his Advowson, by reason *Nullum tempus occurrit Regi* by his Prerogative, but the King might have recovered his presentment in a *Quare Impedit* brought by him, for that the King was not bounden by the plenary, and also because that the words of the Statute of *West. 2.* are, *per fraudem & negligentiam*: and so the King out of the said Statute: And yet in such case without a *Quare Impedit* first brought, the King could not have removed the Incumbent out of the Church.

A Writ of Error was brought in B. R. to reverse a Judgement given in a *Quare Impedit* in the Court of Common Pleas: The Question there was, Whether a Double Usurpation should put the King out of possession of his Advowson, and put

V. 35 H. 6. 60.

1 E. 3. Qu.

Imp. 43.

5 E. 3. 50.

43 E. 3. 15.

18 E. 3. Qu.

Imp. 151.

Cook 6 part,

in Boswells

calc. acc.

35 H. 6. 60.

Trin. 4 Jac. in

B. R. the King

and Champions

case. Cro. 2

part 123.

Telverton 91

Tr. 4 Jac. The

King and Ma-

thews Case ad-

judged, accord-

put dingly.

38 Eliz. C.B.
Huffies case.
Vid. Moors Re-
 ports 421. the
 Case.
Pasc. 25 Eliz.
 C.B. *Yardleys*
 Case.

47 E 3. 4. b.
 acc.
Godbold 7. & 8.
Vid. Yardleys
 Case in *Ander-*
sons Reports 81.
Vid. Tri. 4. Jac.
 in B. R. The
 King & *Cham-*
pions Case.
 2 Cr. 123.

put him to his Writ of Right of Advow-
 son; it was there adjudged, that it was.
 And now Error was brought, and the
 Error was assigned in the Matter of Law:
 and after many Arguments and Motions
 made, it was resolved in this case that the
 King might maintain a *Quare Impedit*;
 for that he hath such a privilege, that as
 he cannot be put out of the Inheritance of
 his Advowson, unless by his own grant,
 so he cannot be of an Advowson: But
 an Usurpation and Plenarty upon it shall
 binde as to the possession, until he remove
 the Incumbent by a *Quare Impedit*; and
 so it was said it was adjudged, 38 Eliz.
 in *Huffies* case: and although it was said
 and objected, that in *Yardleys* case, *Pasc.*
 25 Eliz. in Co. B. it was adjudged, that
 by two Usupations the King might be put
 out of possession, and put to his Writ of
 Right of Advowson: it was said to that
 case, that the Record did not mention
 any induction upon the second present-
 ment, so as there was not any Plenarty
 against the King. And *Popham* and *Tan-*
field Justices said, that they well remem-
 bered that the said *Yardleys* case was well
 argued, as if there had been an Induction;
 But in the case at the Bar, it was agreed
 by all the Justices, that the said Double
 Usurpation (if it was such) should not
 put the King out of possession: and
 thereupon the Judgement given in the
 said case in the Court of Common Pleas
 was Reversed.

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Cap. XXIV. Parsons Law.

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If the King hath an Advowson in the right of his Ward, and a stranger usurps and presents, and his Clark is in by six moneths before the King brings his *Quare Impedit*, yet this Plenarty shall be no good bar against the King; and the reason thereof is, because the King should be otherwise without remedy: For a Writ of Right of Advowson he cannot have, he having an estate in the Advowson but as Guardian; and therefore in that case *Nullum tempus occurrit Regi*: for else a stranger should hold a thing onely by wrong, against him, without any ground: yet in that case the King shall not put out the Incumbent without a *Quare Impedit* brought: For so it is provided by the Statute of 13 R. 2. cap. 11.

But if the King hath title to present by reason of Lapse, and the Patron doth usurp, and presents his Clark, who is admitted, Instituted and Inducted, and then dieth, the King in such case hath lost his presentation, and shall not have the second presentation by his Prerogative; for there *Tempus occurrit Regi*: and the Kings interest was specially limited, and the six moneths was the substance of his title.

Note: M.32. Eliz. c. B. Leon. 1 p. p. 194. Arundel and Bishop of Gloucester's Case. If the Queen hath Title to present by Lapse, and her Title is once executed by presenting, so as nothing remains in her; That in such Case, if a Quare Impedit be brought against the Queens Presentee, and he loseth his Incumbency by ill pleading (as he may do, as well as by Resignation or Deprivation) Resolved the same shall not turn to the Advantage of the Queen: for where her Clark is once Inducted, the Queen hath no more to do: otherwise where the Queen is Patron.

*Stamfords Praerog. fol. 32.
Cook 7 part.
Baskervilles case.*

Upon

Cook 1 part,
Instit. 249.

Upon presentation to an Advowson, the interest of the presentor is to be considered: For in some cases, an Usurpation, although it seemeth to be by Usurpation, shall not put the rightful Patron out of possession: and therefore if a man be seized of an Advowson in Fee, and grants three Avoydances unto one man, one after the other, and the Church becomes void, and the Grantor himself presents his Clark, who is admitted, Instituted and Inducted, and afterwards the Church doth become void again, the Grantee shall present to the second Avoydance, for that he was not put out of possession by the first presentment; for the Grantor had the Frank-tenement and the Fee of the Advowson in him, so that he could not make any Usurpation, to gain any estate to put the Grantee out of possession: and also in respect of the privity of the contract betwixt the Grantor and the Grantee, the presentation of the Grantor upon the first Avoydance, though it seemed to be a kinde of Usurpation, yet the same did not put the Grantee out of the possession, or the interest which was in him of the two last Avoydances.

Vid. 29 E. 3 24.
22 E. 4. 4.
12 H. 8. 1. in
Kellomay.
6 E. 3. 24.
Imp. 39. acc.

If two Coparceners be of an Advowson, and they make composition to present by Turns, and the one of them doth usurp, and presents in the Turn of the other; this usurpation doth not put the other out

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out of possession. And so it is, if two joynt-tenants be ot an Advowson, and the one presents his Clark, who is Instituted and Inducted, this doth not put the other out of possession.

35 H. 8. Br.
370.
17 E. 3. 37. b.
15 E. 3. Dar-
rein present-
ment, 11.
2 R. 3. Qu.
Imp. 102.
Harris & Ni-
chols 3 Cro. 18.
1. and 63.

In 20 E. 3. tit. Qu. Imp. 63. there two joynt-tenants were of an Advowson; and one of them brought a Quare Impedit against the other: and counted of an Advowson in common betwixt them. It was there said by Schard, that this Writ will not lie, but an Affize of Darrein presentment doth more properly lye: But it that Case it was agreed, that the Defendant could not have a Writ to the Bishop; because he did not make title to the Advowson.

But in the Case which before is put, if the joynt-tenant that presented dieth, his presentation shall serve for a title in a Quare Impedit brought by the Survivor.

V. 11 H. 4. Qu.
Imp. 119.
27 H. 8. 11.
acc.

If an Advowson be granted to one for life, the remainder to another in Fee, and the Tenant for life dieth, and afterwards a stranger usurps, and the six moneths pass, in this case he in the remainder was without remedy by the Common Law, for that he could not have a Writ of Right of Advowson: for that Writ was not maintainable but of his own possession, or his Ancestors: and an Affize of Darrein presentment, or Quare Impedit he could not have, because the six

six moneths were past : and so although he had the Right of the Advowson in him, yet this usurpation should have bounden him, and gained the possession from him, for that he had not any action for the recovery of his Right : and so it was if a Tenant for life of a Mannor to which an Advowson is appendant had suffered an usurpation, and the Tenant for life died, he in the remainder had no remedy for this usurpation : And although the words of the Statute of *Westm. 2 cap. 5.* are, *Habeant eandem actionem & recuperationem per Breve de Advocatione possessorium, qualem haberet ultimus Antecessor* ; Yet at this day, I do

Vid. 43 E. 3. 25.
By *Mowbray.*

conceive the Law to be, that they shall be aided by the Statute of *Westm. 2.* notwithstanding this usurpation upon the Tenant for life.

7. R. 2. *Statham. Qu. Imp. 34.* it was admitted for Law, that if a Tenant for life suffereth an usurpation, he in the Reversion shall avoid it after the death of the Tenant for life ; Notwithstanding that the Book of Mic. 16 E. 3. *Qu. Imp. 67.* is, that a Purchaser shall not avoid a presentation had against his Feoffor.

45 E. 3. by *Finchden*, if a stranger usurpeth upon any Tenant for life, and afterwards the Tenant confirms his estate in Fee, and the stranger presenteth two or three times, and the Tenant for life dieth :

dieth : and afterwards the Church becomes void, I shall present ; and upon any disturbance I shall have a *Quare Impedit* ; for the Statute of *Westm. 2.* being made for to suppress wrong doing, shall be taken largely . and so it was adjudged in the Court of Common Pleas, Pasc. 14. *Jas. Rot. 1030.* in the Lord *Stanhope* and *Williams* case, where the case was, That a Prior did grant the next Avoyd-
dand, and the Grantee suffered an usurpation ; and it was adjudged, that the Prior himself might have been aided by the Statute of *Westm. 2. cap. 5.* and had a *Quare Impedit* ; and so was the Law taken to be for every Lessee upon an usurpation had upon his Lessor.

Pasc. 14 *Jac. Rot. 1030.* in Co. B. Lord *Stanhope* and *Williams* case.

And *vid. 44 E. 3. Qu Imp. 134.* by *44 E. 3. Qu Belknap and Finchden* : if one be Tenant for life of an Advowson in gross, and a stranger presents, and Tenant for life confirms it, and then the Tenant for life dieth, and the Church becomes void again : he in the Reversion may have a *Quare Impedit*.

Again, the time of an usurpation is also considerable ; if an usurpation be had upon one to an Advowson in the time of War, this usurpation doth not put the Rightful Patron out of possession, although the incumbent be instituted and inducted in the time of peace : for the Law respects and looks back upon the original act, which is the Presentment ;
and

7 R. 2 *Darr. Present. 2.*
18 E. 3. *Qu Imp. 175.*

9 E. 3. 16. acc.

and the same being in time of War, the War doth not onely give priviledge to them which be in the War, but to all others within the Kingdom; and therefore although that the admission and institution be in time of peace, yet the presentment being in time of War, the same doth not put the Lawful Patron out of possession: So if an usurpation be upon an Abbot, or Bishop, (*sede vacante*) this usurpation shall not prejudice his Successor, but that he shall have a *Quare Impedit*, and thereupon shall remove the incumbent, and shall present; but if such an usurpation had been in the time of his predecessor, this should have put the Successor out of possession, if the six moneths were past. M. 37 Eliz. in *Beverly* and *Cornwall's* Case. Cro. 3 par. 44. Upon every Recovery in a *Quare Impedit*, he that comes in *pendente Lite*, shall be removed: Vid. Pasc. 36. Eliz. B. R. Cro. 3 par. 324. *Pipe* and the *Queens* Case, acc.

5 H. 5. 3. acc.

8 R. 2. Fitz.

Qu. Imp. 200. acc.

V. Mic. 29.

Eliz. in Co. B.

Beverley and*Cornwall's* case.

acc. Leon. 1.

part, 63.

Vid. Moor 241.

the same case.

If the Patron of a Benefice be Outlawed, and the Church doth become void, so as the title of presentment is come to the King in regard of the Outlawry, and a stranger usurps upon the King, and the six moneths pass, and the King brings a *Quare Impedit* and removes the incumbent, now is the Advowson re-continued to the rightful Patron; and the usurpation whilest the title was in the King,

King, did not gain the inheritance of the Advowson out of the Rightful Patron, but that he after the Outlawry reversed, or pardoned, may present, if the Church doth become void. But yet the Rightful Patron may destroy his own title, and give away his right unto an Usurper by his own act, and make the presentation by the usurpation good: as if two men present by usurpation to a Church, and their Clark be admitted, Instituted and Inducted, the Patron may release his right in the Advowson to one of them, and thereby destroy his own title, and the same is good, and as to the presentment shall enure to the Clark of them both, and shall enure to establish the Clark in the possession of the Church; for that the Clark comes in not merely by wrong, but by admission and institution of the Ordinary, which are Judicial and Lawful acts: and in such case he to whom the release was made, shall not now put out the Clark, although he hath now better title to the Advowson: But the Clark shall be now said to be in by them both, and his title good, by this release of the rightful Patron.

CAP. XXV.

What Remedy the Patron hath to recover his Advowson, or Presentment upon an Usurpation. And of the Writs of Droit de Advowson, Affize de Darrein Presentment, and Quare Impedit.

IF an Usurpation be had upon the Patron of his Advowson, or if he be disturbed in his presentation, the Church being void, the Law hath provided several Writs and Remedies for the recovery of the Advowson, and for the removing of the incumbent: The Writs which the Law hath given to the Patron, is either a Writ of Right of Advowson, an Affize of *Darrein* presentment, or a *Quare Impedit*; the first is a Writ for the Recovery of the Right of the Patronage, the other two are Writs concerning the possession.

7 *Eliz.* 3. 246. 43 *E.* 3. 15. 43. *Aff.* 21. 19 *H.* 6. 20. 22 *E.* 4. 9. If the Purchaser doth never present, but suffer an Usurpation, and the Incumbent of the Usurper is in by six moneths, he hath lost now his right of Advowson, and the same is become remediless: But if a
Pur-

Purchaser do present once, and at the next Avoydance a stranger doth present, and his Clark is in by six moneths; his right is not gone: for although he cannot have a *Quare Impedit*, yet he may have a Writ of Right of Advowson. Tr. 13 *Jac.* in *Harris and Austins Case.* By *Doddridge Justice.* *Bolstr.* 3. part. 40.

Mic. 13 *Jac.* in Co. B. it was holden, that if a man doth present by usurpation to my Advowson within the six moneths, I may have a *Quare impedit*: But after the six moneths past, I am put to my Writ of Right of Advowson: so if one usurpeth upon the King, the King is put to his *Quare Impedit* within the six moneths, and upon a double usurpation, he is put to his Writ of Right: *Quare* this case, for that is contrary to the Resolution of the Justices in the case between the King and *Champion*, which before *vide* in the precedent Chapter.

The Writ of Right of Advowson, is a Writ of the highest Nature that the Patron can have: it is such a Writ wherein he may try his Right either by Battail or by Grand Assize: and it lyeth only for him who hath a Fee-simple in the Patronage, and doth not lye for him who hath but only an estate in tail, or any other inferior particular estate.

If a man hath an Advowson to him and the heirs of his body, and for want of such issue, to the remainder to him

V. Glan. H.6.
cap. 17. lib. 13.
ca. 20, 21. acc.

F.B. Cook.
2 part, Init.
336. 35 H.6.
10-25 H.8. 3.
acc.

21 E.4.1.

25 E.3.54. acc.

33 E.3. Fitz.
tit. Present-
ment. 6. acc.M. 25 E.3. 54.
acc.19 H.6.39, &
40. acc.

14 H.6.15. b.

and his heirs, if an usurpation be had upon him, he shall not have a Writ of Right of Advowson, and recover the simple: and that appeareth by the Book of 4 E. 3. 48. by *Wilby*, where such a Tenant in tail brought a Writ of Right, and recovered but an estate in tail: But yet such a Tenant in tail may have an Assize of *Darrein Presentment*, or a *Quare Impedit* at his Election. 26 H. 8. 3. by *Knighly*, A man shall not have *Droit de Advowson*, if his Clark be not Inducted. And in this Writ the Plaintiff must count either of his own possession of the Advowson, or of the possession of some of his Ancestors. For if a man purchaseth an Advowson to him and his heirs, and afterwards the Church becomes void, and then a stranger that hath no right to present, presents to the Avoydance, and his Clark be instituted and inducted, and afterwards the Church doth become void again, there the purchaser by this usurpation is put out of possession of the Church, and cannot maintain a Writ of Right of Advowson, because therein he cannot Count of his own possession, or of the possession of any of his Ancestors.

There is some difference in the form and frame of the Writ of Right of Advowson. For it is to be known, that there is *Advocatio Medietatis Ecclesie*, and *Medietas Advocationis Ecclesie*. *Advocatio Medietatis Ecclesie* is, where there be two Patrons

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vocationis; For if two have an Advowson in Common, or Jointly, and one presenteth, the other hath no remedy, because that the presentment is but a personal thing which is entire: And if two Patrons make a Consolidation, or an Union of two Churches, if one be disturbed, he might have his *Quare Impedit ipsum Presentare ad Ecclesiam*, and not *ad Advocationem Medietatis Ecclesie*, or *ad Medietatem Advocationis Ecclesie*.

2. Cook 2 par.
Instit 364.
38 E. 3. 13.
38 E. 3. 19. br.
Droit de recto.
8. acc.

If there be two Patrons of two Churches adjoining, and the incumbent of one of the Patrons demandeth Tythes in the Spiritual Court against the incumbent of the other: and the one of the Patrons sueth a Writ of *Indicavit* to stop his proceedings there, because the right of the Patronage cometh in question: In that case, the Patron of the Clerk prohibited may have a Writ *de Recto de Advocatione Decimarum*, in this Form, viz. *Precipe A. quod reddat B. Advocationem Decimarum, Medietatis, tertie, quartæ partis unius Carucat terre, &c.*

21 E. 4. 2. 3.
Bracton lib 4.
246, 247.
Fleta. lib 5.
cap. 12.
Glanville. l. 6.
c. 17.

Assize of Darrein Presentment, or *Assisa ultima Presentationis*, and *Quare Impedit*, are grounded upon the possession, which the Patron upon an usurpation had upon his own possession, or his Ancestors, or upon a special Disturbance, may have and maintain; and thereby shall he recover the presentment, and remove the Incumbent who is in by wrong, and re-

cover

cover Damages. *Vide Mic. 15 Jac. Moor.*
 883. *Andrew and Bishop of Yorks Case.*
 Retolved, it is a good plea in an Assize of
Darrein Presentment, That the Plaintiff
 hath a *Quare Impedit* depending of the
 same Avoydance. But yet there is a differ-
 ence betwixt the Writs of *Darrein Pre-*
sentment, and *Qu. Imp.* For 1. Where a
 man may have a Writ of *Darrein Pre-*
sentment, there he may have a *Quare Im-*
pedit, but not *è converso*. 2. A man may
 have a Writ of *Quare Impedit*, without
 alledging of any presentment in a person
 certain; but a man cannot have an Assize
 of *Darrein presentment*, but therein he
 must alledge the presentment in some
 person certain. 3. A Lessee for years,
 Guardian, or Tenant at Will may have a
Quare Impedit, but they cannot have or
 maintain a *Darrein presentment*, because
 that no person can maintain an Assize, but
 he that hath a Freehold. 4. If the Hus-
 band be seized of an Advowson in the
 Wives right, and a stranger doth usurp,
 the Husband may have a *Quare Impedit*
 in his own name, without the naming the
 Wife in the Writ, for that the disturbance
 is personal, which falls in damage to the
 Husband: But he cannot have an Assize
 of *Darrein presentment* wherein the Ad-
 vovson is to be recovered, but the Wife
 must be joyned, and named in the
 Writ.

In Assize of *Darrein presentment* the

20 E.3. *Dare.*

Present. 13.

Old Natur.

Brev. 25.

Tr. 38 *Elix.*

Moore 456.

in the

Countess of

Northumber-

lands Case.

5 H.7. 14. by

Fairfax.

50 E.3. 14 by

Hobert.

16 H.7. 6.

21 E.4. 2.

17.9 E.3. 465.

It is holden

that a man

shall not al-

ledge a *Dar-*

rein Present-

ment against

the King.

17.50 E.3. 14.

acc.

14 H.4. 12.

50 E.3. 14.

Writ doth suppose that the Defendant doth desorce him of the Advowson, and yet in the Count, or Declaration he counts that he or his Ancestors did last present; and the Count although it seemeth repugnant to the Writ, yet it is not so, but is good, and the Count, shall not for the seeming variance abate the Writ, because there is no other form of Writ.

39 H. 6. 39.
34 H. 6. 38.
43 Ass. 21.
13 E. 3. protection 52.
40 E. 3. 1.
11 H. 6. 3.
15 E. 3. Conu-
nusians 41.
9 H. 7. 15.
5 H. 7. 16.
Br. Aid. 120.

In these Writs of *Darrein presentment*, and *Quare Impedit*, A protection doth not lie for the Defendant, because of the danger of the Lapse: Neither shall *Conu- nusians* of Pleas be granted in a *Quare In- pedit*, because the inferior Court cannot write to the Bishop to admit the Clerk: neither shall a man have aid in a *Quare Impedit* for the danger of Lapse.

Vid. 31 Eliz. Popham 189. Adjudged in *Brokesbies* Case; That an Executor shall have a *Quare Impedit* upon a disturbance in *vita Testatoris*; *Vid.* Mic. 2 Car. B. R. *Lemasons* and *Dicksons* Case, acc. But see Tr. 31 Eliz. *Smalwood* and the Bishop of *Lichfields* Case. There a *Qu. Imp.* was brought by Executors upon a disturbance in *vita Testatoris*, in *retardationem Executionis Testamenti*, and holden the Writ should abate. Leon 1. part, 205.

Every *Quare Impedit* must be brought against the Patron, the Ordinary, and the Incumbent: For if it be brought against the Ordinary and Incumbent onely with-

without naming the Patron in the Writ, the Writ shall abate; But yet it stands upon this difference, viz. If the Inheritance of the Patron in the Patronage is to be divested by the Judgement to be given in the *Quare Impedit*, then the Patron ought to be named in the Writ; But when the Inheritance is not to be divested by the Judgement, but the presentment onely to be recovered, there it is not necessary that the Patron be always named in the Writ.

9 H. 6. 30. By *Babington*, A *Quare Impedit* lieth against the Patron without naming the Incumbent; but see 22 E.

44. If the Incumbent and the Disturber be named it is good, although the Patron be not named in the Writ.

46 E. 3. 6. The King seizeth the Lands of a Prior Alien, and lets the same; a Church voids, and the King presents: the presentment of the King doth not take away the Patronage, but the right thereof doth remain in the Prior Alien.

Vid. 3 H. 4. 3. If a *Quare Imp.* be brought by the King against the Incumbent alone without naming the Patron in the Writ, the Writ shall not abate, but the Judgement shall be; That the Defendant *eat sine die*. *Vid.* 4 Eliz. 3. 6. 47 E. 3. acc. the King needs not name the Patron in the Writ.

If A. hath the Nomination to a Church, and a Bishop the presentation, and

42 E. 3. 7. acc.
1 H. 5. 7. A
Scire facias by
the King a-
gainst the In-
cumbent with-
out naming
the Patron,
good.
Cook 7 part,
26. in *Halls*
case.
Leon 2 p. 58.
acc.
7 H. 4. 25.
3 H. 4. 3.
13 H. 8. 13.
47 E. 3. 11.

38 H. 8. *Dyer*
48.

4 E. 6. pett.
Br. 410.

cook 1 part,
Instit. 344.

M. 3 Jac. 2.
Cro. 92. Lanca-
ster and
Lowes Case.
9 H. 6. 30, 31.
19 H. 6. 68.

and the Temporalities of the Bishop come to the King, and afterwards the King doth present without the Nomination of A. and his Clark is inducted; There the *Quare Impedit* must be brought against the Bishop and incumbent onely, for that the King cannot be a Disturber, and the Writ will not lie against him for that he can do no wrong: But it seemeth, the Bishop must be named in the Writ; for that the incumbent could not come into the possession of the Church, but by the Admission of the Bishop, and the Bishop may be a special Disturber. And as it is good policy upon every presentation had by usurpation, or other Disturbance, to bring a *Quare Impedit* as speedily as may be: so likewise it is good policy to name the Bishop in the Writ, as it was holden by the Justices in the Court of Common Pleas, Mic. 3 Jac. in *Lancaster and Lowes Case*: for then he shall not Collate for Lapse, if the Church void during the six moneths: Neither shall the Metropolitan, if the time be come unto him, Collate for the same Lapse; For it is a Rule in Law, That the Metropolitan shall never Collate for Lapse, but when the immediate Ordinary might have Collated for Lapse, and hath surceased his time: And in this case, the Ordinary cannot Collate, because he is made a party to the Writ which is brought.

The

The Writ of *Quare Impedit* is a Mixt
 Actions for Summons and Severance lyeth ^{5 H.7.34.}
 therein : and although the presentment
 may *inclusivè* be recovered thereby ; yet
 Damages are the principal which is respect-
 ed in it ; and therefore, If the Husband
 and Wife be seized of an Advowson in ^{50 E.3.13.}
 the right of the Wife : if the Church be ^{28 H.6.9. acc.}
 void, and the Husband be disturbed in
 his presentment to the Avoydancer, he
 may have a *Quare Impedit* in his own
 name, without naming the Wife in the
 Writ ; for although the presentment be ^{22. H.6.27. b.}
 recovered thereby, yet for the disturbance ^{9 H.6.57. acc.}
 which is a personal wrong, damages are
 to be recovered, which shall go to the
 Husband ; and therefore a release of all
 Actions personal, is a good bar in a *Qua-*
re Impedit brought by him.

Trin. 36 Eliz. B. R. The Queen and
Buckbeards Case. 1. Leon. 149. In a *Qua-*
re Impedit the Queen *post tempus semestre*
 had judgment to recover Damages for
 the value of the Church half a year. And
 upon Error brought, the Question was in
 this Case, Whether the Queen should re-
 cover damages, her Title being, *jure Co-*
ronæ, for Laple, and adjudged she should
 recover damages.

If the Plaintiff be Non-suit in his *Qua-* ^{33 H.6.1.}
re Impedit after the appearance, the same ^{22 H.6.44.}
 is a good bar in another *Quare Impedit* ^{38 H.6.14.}
 brought within the six moneths ; and the ^{24 E.3.25. b.}
 Defendant upon title made, shall have a
 Writ

Cook 7 part,
Sir *Hugh Port-*
mans case.

26 E.3. 24.
Imp. 163.

Cook 6 part,
Spencers case.

14 H.4. 12.
10 Eliz. Dyer
279.
37 H.6. 7.
17 E.3. bre.
665.

Cook 1 part,
Instit. 198.
3 H.5. br.
Qu. Imp. 71.

3 Eliz. Dyer.
194.

Writ to the Bishop : and so it is if the Plaintiff doth discontinue his suit : or if he be made a Knight pendant the Writ, the same shall abate the Writ, because it is his own Act : But if the Writ doth abate for insufficiencie of form, or for false Latine, or misnaming of the Plaintiff or Defendant in it, there the Defendant shall not have a Writ to the Bishop, but the Plaintiff shall have a new Writ by *Journeys Accompt.*

If two Tenents in Common, or Coparceners be of an Advowson, and a stranger doth usurp, so as their Right is turned into action, and they bring a *Quare Impedit*, and six moneths pass, and then one of the Plaintiffs dyeth, the Writ shall not abate, but the Survivor shall recover ; otherwise there would be no remedy to redress this wrongful usurpation ; but they must joyn in the first Writ ; for if the Writ be brought by one of them, the Writ shall abate : But if a *Quare Impedit* be brought against against the Patron and the Incumbent, and pendant the Writ the Patron dyeth, there the Writ shall abate, as it is said in *Cook* 7. part. in *Halls* case. But *Quere* of that case. For that it seemeth contrary to the case in 3 *Eliz.* Dyer 194. where the case was, that the Bishop of *Coventry* and *Litchfield*, Patron of two Priebeys, granted the next Avoydance *alterius eorum primo vacans*. Which was confirmed by the Dean and Chapter ; the

the Bishop dyed, and one of the Prebends voided, and the Successor of the Bishop presented, and afterwards the Grantee brought a *Quare Impedit* within the six moneths, and two years after the Issue was found for the Plaintiff, and the Bishop dyed, and yet the Plaintiff had his Judgment, and had a Writ to the Bishop to remove the Incumbent who was presented by the Successor of the first Bishop.

CAP.

CAP. XXVI.

Of the Profits of the Rectory, viz. Oblations, Obventions, Offerings and Tythes. And where Suit for Tythes shall be in the Spiritual Court; Where in the Temporal Court.

THE Profits and Fruits of the Parsonage or Rectory belonging to the Parson or Vicar besides the Gleab-Lands, of which we have before spoken, doth chiefly consist in Oblations, Obventions, Offerings and Tythes. Of Oblations, Obventions and Offerings, being meer Spiritual things, and not much touched upon in the Books of our Law, I will forbear to speak at this time; and say somewhat of the Last of them, viz. Tythes, of which there is much said in the Books of the Common Law.

Cook, 11. part, 13. in Pridle and Nappers case.

7 E. 6. Dyer 84.

31 El. in C.B. Perkins and Hinds case adjudg. acc.

Hyl. 35 El. B.R. Sherwood and Winchcombs case. Cro. 3. part, 293.

3. C. 216. Wickham versus Cowper.

Tythes are an Ecclesiastical Inheritance, Collateral to the estate of the Lands, viz. to take the tenth part of the profits of the Lands, and recoverable only in the Ecclesiastical Court: They are not extinguished by a Feoffment made of the Lands; by the demise of the Lands, with all Profits and Commodities belonging to the

the same, they will not pass; They are not issuing out of Land as Rent is, Nor can they be extinct by Unity of possession, unless it be a perpetual Unity, as hereafter shall be shewed. All which prove them to be Collateral to the Land. *Trin. 31 Eliz. B. R. Styles and Millers Case. Leon. 1. part. 300. acc. Vid. Moor. 530. Mich. 41 Eliz. in Benton and Trotts Case.*

In Antient time, before the Council of *Lateran*, every man might have given his Tythes to what Church he pleased, and have bestowed them upon what Parson he thought best; Or the Bishop of every Diocess might have made a Distribution of them, within his own Diocess: But by a Canon made in the said Council every man is since compellable to pay or give his Tythes to the Parson or Vicar of that Parish where they are growing or arising. Now although before the said Council the parties might have granted them at their own Liberties: Or that they might have been distributed as abovesaid. and by the said Canon, they are now restrained to give or pay them to the Parson or Vicar of that Parish where the Tythes arise; yet did not that Canon make them to be more Ecclesiastical than they were before; But the Jurisdiction of Tythes, as well before the said Canon, as ever since, did *de jure* belong to the Ecclesiastical Court; for neither *Allize* or *Precipe* did

An. Dom. 636. Honorius Epif. Cant. first began to divide England into Parishes. Vid. Selden. c. 9. de Decimis. When Parishes began. V. Hil. 38 El. in Robins and Gerrards case. Moors Reports 436, 437. acc.

did lie of Tythes, or any other Ecclesiastical duty at the Common Law; and therefore (although we finde in some Books and Records of our Law, That Suits have been prosecuted in Courts of Lords of Mannors, and in the Kings Temporal Courts, as in particular, *Cook* 2 part, *Instit.* 661. A *Scire facias* at Common Law lay of Tythes. Register 165. A Writ of Covenant brought to levy a Fine *de Decimis Garbarum*, wherewith agreeth 38 H. 6. 20. 7 E. 3. 5. by *Parning*: and a Writ of Right of Advowson, *de Advocatione Decimarum Ecclesie*, as is said in 4 E. 3. 27. by *Shard* and *Stoner*, with which agree the Books 8 E. 3. 49. 12 E. 4. 13. 31 H. 8. br. Prohibition 17.) Yet the said Suits were not for them as Tythes meerly, but as Lay-profits apprender, and not as Ecclesiastical duties; and therefore where it appeareth in the book of 44 E. 3. 5. that an Assise was brought of Tythes, it is to be observed in the Book, that the Assise there brought, was of the tenth of all manner of Corn and Grain growing in 100 Acres of Lands, after the Tythes of the Parson were taken, which was but a Lay-profit Apprender, and no Ecclesiastical Duty.

If Tythes do lie in any Forrest, as in the Forrest of *Windsor, Rockingham, Sherwood*, or other Forrest which is out of any Parish, they King shall have them by his Prerogative: and not the Bishop of the

44 E. 3. 5.

Vid. 10 H. 7. 18.

14 H. 4. 17.

the Diocels; or the Metropolitan of the Province, as some have thought: But yet it seemeth by the Book of 22 Aff. 75. That if there be cause of Suit for such Tythes against the Parties who ought to pay the same, the Suit must commence, and be brought in the Ecclesiastical Court. But if a stranger taketh away such Tythes, then for such Trespas, Suit may be in the Temporal Court, as the same may be for the taking away of other goods in the like case; And in some case, actions will lie of Tythes at the Common Law, as it was adjudged, Trin. Car. 15. in the Kings Bench, that an *Ejectione firme* will lie of Tythes.

22 Aff. 75. Br.
Dismes 10.

In 16 E. 3. *Qu. Imp.* 147. the King brought a *Præcipe quod reddat* of the fourth part of the Tythes and Offerings of the Church of St. Dunstons in the West, against a Prior, and it was Ruled that the Writ did lie; but it is to be noted, that the Writ was not brought (as I conceive) against the Prior as a Parishioner who ought to pay the Tythes, but against him as Prior, for taking away the Tythes against Right; so as the Suit was not originally for the Tythes as Tythes, but the wrongful taking and carrying them away. For Tythes set forth are become Lay-Chattels, for which the King had his Remedy at the Common Law, if they were taken from him; and by the Common Law: the

38 E. 3. 9. acc.
16 E. 3. *Qu.*
Imp. 147.
V. 30 E. 1. in
acc.
38 E. 3. 13. by
Finchden.
Cook 11 part,
Dr. Grants
case.

P King

King was capable of Tythes.

38 E. 3. 20.

In 38 E. 3. 20. A Prior Alien Farmer of the King, was indebted to the King for his Farm, and being sued for the same in the Court of Exchequer, he shewed unto the Court that there was a Parson who held a portion of Tythes which was parcel of the possessions belonging to his Farm; and that the Parson withheld the Tythes from him, so as by reason thereof he could not pay the King his Farm-Rent without having of those Tythes which were in the Parsons hands: and upon this a *Quo Minus* issued out of the Court of Exchequer, at the Suit of the King and of the Prior against the Parson, for the paying of those Tythes to the King: and there it was said by *Shipwith*, That of that which concerneth the King, and may turn to his advantage, and may hasten his business, whether the thing be Spiritual or Temporal, the Court of Exchequer shall have the Jurisdiction; But note, that that was by the Kings Preogative, for that it was agreed, that Suit for Tythes doth not fall into the Jurisdiction of the Kings Bench, or Common Pleas, for that the Right of Tythes is determinable only in the Ecclesiastical Court. But

Vid. Comers Case, vouched in the Dean and Chapter of *Winsors Case*, *Leon.* 2 p. 146. The King gave a Parsonage to a Priory in Frankalmoigne, and the Tythes thereof

thereof were withdrawn: The Prior impleaded him who withdrew them in the Exchequer: It was Resolved, that he should have the priviledge to sue for them there, for that the King is in danger to lose his Patronage, or his Foundership, if the Rectory be diverted.

All Tythes then being originally Suitable for, and recoverable in the Ecclesiastical Court, let us see how far the Statute of 32 H. 8. *cap.* 7. hath altered the Law in this point.

After the Statute of 27 and 31 H. 8. of Dissolutions of Abbies and Monasteries: by which Acts of Parliament, many Advowsons, Parsonages, Vicarages, Penfions, Portions and Tythes came unto the Crown, and were afterwards by Conveyance, or otherwise transferred, and granted over unto Lay persons, who were not capable of Tythes by the Common Law. The Statute of 32 H. 8. *cap.* 7. was made: By which Statute it is enacted, *viz.* That if any person which should have any estate of Inheritance, or Freehold, Term, Right, or Interest in any Parsonage, Vicarage, Portion, Penfion, Tythes, or other Ecclesiastical or Spiritual duty or profits then made Temporal, or which should be suffered to go into Lay-mens hands, should be disseized, wronged, or kept out of their Lawful Inheritance, Rights or Interests to the same, that the persons so Disseized, or wrong-

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fully kept out of their rights or possessions, their heirs, &c. should have recovery in the Kings Temporal Courts for the recovery of their rights or possessions, by Writs of *Precipe quod reddat*, Assize of Novel Disseisin, Writs of Dower, or other Writs as the Case shall require.

This Statute for these Tythes, Oblations, and other Spiritual profits made Lay-tes in temporal mens hands as aforesaid, gave remedy in the Kings Temporal Courts; Yet did not this Statute take away the force of the Ecclesiastical Law concerning Tythes: But not for setting forth of Tythes, or for refusing to pay the same, all Ecclesiastical persons who had right before the said Statute to have Tythes, or Oblations, &c. might demand and factor the same in the Ecclesiastical Court: So as this Statute was an addition unto the Law in respect of the Lay-tes, and no alteration or Diminution of that power that the Ecclesiastical person had for his tythes in the spiritual Court before the Statute: And upon this Law (as I conceive) was the Case of 7 Ed. 6. in Dyer 83. grounded; where an Assize was brought *de libero tenemento de quadam portione decimarum* And the Case of Pasch. 5 Jacobi, the Countess of Oxford's Case, where a Writ of Dower was brought of predial Tythes: for that I have not found, or read in any Book of the Common Law, That a woman was dowable of Tythes,

or

or that any *Allife* or *Precipe* did lie of them as Ecclesiastical duties; for that it is said, in *Cook II part 13.* in *Yrdle and Nappers Case*, That a Lay-man could not have an inheritance in Tythes at the Common Law; nor did they pass betwixt party and party as other temporal Inheritances did: But now, (as I said before) Tythes and other Ecclesiastical duties that came to the Crown by the Statutes of 27 and 31 H. 8. of Dissolutions, are by these Statutes in the hands of Lay-men temporal Inheritances, and shall be accounted *Assets*, and the husband shall be tenant by the Courtellie, and wives shall be endowed of them, and have other incidents belonging to temporal inheritances: This only Ecclesiastical quality and privilege they still have and retain, that the owner or proprietor thereof may sue for the same for the subtraction of them if he please.

In the nineteenth year of the Reign of Queen *Eliz.* in the Kings Bench it was disputed, whether Tythes were due *de jure Divini*, or by the constitution only of men; and it seemed to the then Judges, that they were as well due by the constitution of Kings, as by the Law of God: This agreeth well with the Discourse of the Student, in the Book call'd *Doctor and Student*, fol. 166. *Patet quod ad solutionem Decimarum tenentur homines partim quidem ex jure naturali, quantum ad*

hoc quod aliqua portio data est Ministris Ecclesie, partim vero ex institutione Ecclesie quantum ad determinationem decime partis. Cook, Select Cases. 16. If it was disputed *de quota parte*, for the Student there holdeth, that the tenth part was due only by mans Law; and for to confirm his opinion, he voucheth Gerson the Divine, in his Treatise intituled *Regule morales*, where he saith, *Solutio Decimarum Sacerdotibus est de jure Divino, quatenus inde sustentantur sed quoad tam hanc quam illam partem assignare aut in alios redditus commutare positivum juris est.* And in another place where he saith, *Non vocatur portio Curatis debita propter a Decima, eo quod sit semper decima pars; imo est interdum vicesima, aut tricesima:* but that Tythes were due *ex jure Divino*, there was never any Question, or doubt; but, *de quota parte*, there hath been some question: and although we find in Mr. Fitzherberts *Natura Brevium* 30. that before the Statute of 18 E. 3. right of Tythes was sometimes decided in temporal Courts, concerning which I have before delivered my conceit, yet did not that make them not to be Spiritual; as before is said: for we see that the Probate of Wills and Testaments did belong unto Lords of Mannors in their Courts, and did appertain to the Spiritual Courts but of later times, as is said in Cook 9. part in *Henslowe Case*, wherewith agreeth *Linwood lib. 5. de Testament.*

flament. and 11 H. 7. 12. and belonged unto Ordinaries, *ex consuetudine Angliæ*, & *non de communi jure*, as is there also said; Yet it is not to be thought or doubted, but that Wills and Testaments, and Legacies therein contained, were esteemed Ecclesiastical, and to appertain to Ecclesiastical Jurisdiction. But Tythes (as I conceive) in themselves (*quatenus* Tythes) were ever spiritual and due *ex jure divino*, and were not accounted as temporal inheritance; for they could not be appendants unto Mannors or Lands; nor were they such things out of which rents and services could be reserved, nor were they transferrable as other temporal inheritances were; and y^t they might have been given in exchange for other temporal inheritances; for in exchanges it is not requisite that the things exchanged be of one nature or quality; and therefore the exchange of tythes for annuity or rent was good in 9 E. 4. 21. in the Prior of *Sempringhams* Case; but there it is to be noted, that the same was betwixt Religious and Ecclesiastical persons, and not betwixt them and Lay men; for before the Statute of 32 H. 8. cap. 7. Lay men were no way capable of Tythes in p^{er}petuity, as before is said.

If a Parson maketh a Lease for years of Tr 31 E. B.R. his Parsonage and Gleab-lands, ren- *Stile and vint- ters case.* dring a rent for all manner of demands *Leor. 1 p. 300.* as *Quere.*

32 *Eliz.* Par-
son *Babingtons*
Case.

30 *H.8.* *Dyer*

43. 42 *E. 3.*

13. by *Kinton*

77. 38 *Eliz.*

B.R. Blinco's

Case, *Cro. 3.*

Part 479.

Mic. 6 Jac.
Cq B. Smiths
Case.

19 *H.8.* 12.

21 *H. 7.* 21.

9 *E. 4.* 47, 48.
acc.

as well Spiritual as Temporal, yet the
Leasee shall pay the Tythe heretof to the
Parson for that Land, as it was holden
Pasc. 32. *Eliz.* in Parson *Babingtons*
Case; for that tythes are due *ex jure di-*
vino, and they cannot be included in
the Rent; But if the Vicar be en-
dowed of Tythes of all the Lands within
the Parish, and the Parson leases his Gleab,
the Leasee shall not pay Tythes to the
Vicar, because it is parcel of the Church-
Lands, and *Ecclesia Ecclesie Decimas sol-*
vere non debet.

If Tythes be severed and set forth,
and afterwards the Parson leaseth out his
Parsonage, without mentioning of the
Tythes, the Tythes set forth shall pass;
and so it was adjudged, *Mic. 6 Jacobi*
in the Common Pleas in *Smiths* Case:
for although they be divided and seve-
red, yet they are (as yet) Spiritual du-
ties of the Parsonage; but if the Tythes
be caried into the Barn, and afterwards
the Parson leaseth out his Parsonage
with all profits, commodities, &c. those
Tythes shall not pass to the Leasee; for
that by so doing they are now become
his Lay-chartels.

If a Parson doth demise his Rectory
for years, the Tythes will pass *inclusive*,
although the Lease be by word onely:
But if a Parson leaseth out his Tythes
alone, they will not pass unless the Lease
be by Deed or writing, as was adjudged,

Tr.

Tr. 26 *Eliz.* in the Kings Bench in *Withy* and *Sanders* Case. But that stands also upon a difference; for the Parson may demise his Tythes to the owner of the Land for one year by word onely, as it was agreed by all the Judges in B. R.

Mic. 2 *Car.* Rot. 179. in *Bellamy* and *Babthorps* Case; but he cannot demise them to a stranger, but it must be by deed: and although Tythes will pass to the owner of the soil by contract onely, as before is said; yet may the Parson notwithstanding such contract sue the owner of the soil for the Tythes in kinde in the Spiritual Court, and the owner by reason of such a contract shall not have a prohibition to stay his suit there, as was holden

Mic. 2 Car.
B.R. *Bellamy*
and *Babthorps*
Case.

Mic. 8 *Jacobi* in Co. B. in *Crofts* Case; but the owner may sue the Parson upon the contract in the Temporal Court, and recover as much in damages; but then in his pleading he must not declare of a verbal contract, but must set forth the same to have been made in writing; and so it was holden, *Pasc. 7 Jacobi* in Co. B.

Mic. 8 Jac.
C. B. *Crofts*
Case.

in *Pawlings* Case. In consideration of 5 l. paid to the Parson, it was agreed between him and *W.* (one of his parishioners) that *W.* and his Assignes should hold the Lands discharged of tythes during the the Parsons life: adjudged, that this agreement being without Deed, is not good. 3 Cr. 188, and 249. *Bug* and *Nelson* against *Woodward*.

Pasc. 7 Jac.
C. B. *Pawlings*
Case.

CAP. XXVII.

What Persons were capable of tythes at the Common Law: Of what things tythes shall be paid. What shall be a good Modus Décimandi for tythes, and how far it bindes the incumbent and his successor. And of divers othes things concerning the payment of tythes.

BY this that hath been said, it appeareth, that by the Common Law, a meer Lay man was not capable of Tythes, nor could any man sue for the same in the Ecclesiastical Court, except he were a Spiritual or Ecclesiastical person: and to that purpose, see 11 Aff. 9. where it is said, that no man shall sue for tythes but the Parson; and if he joyneth another in the suit with him, his suit shall abate.

11 Aff. 9. Br.
Dismes 9. acc.

2 R. 2. Juris-
dict. 37.

In 2 R. 2. Jurisdiction 37. In an action of Trespass, the defendant justified for tythes in the right of his Master, and pleaded to the jurisdiction of the Court, and he was forced to answer the action there, for that the plaintiff could not have his remedy in the Spiritual Court against the defendant for the said tythes,
nor

nor could the defendant sue the plaintiff in the Spiritual Court for the same, but a prohibition would lie, for that he was not a person able to sue for Tythes there, being a Lay-man; and the right of the Tythes was not tryable in the Spiritual Court. but betwixt Spiritual persons. 39 E.3.24.a.

Mich. 33, & 34 Eliz. 3. Cr. 251. When the right of Tythes is in question between two Parsons, the Tryal belongs to the Civil Law. *Dullingham* against *Kysley*. Trin. 35 Eliz. *Sherborns* case. Cro. 1. part. acc. *Vid.* Mich. 28 & 29 Eliz. *Bush* and *Hunts* case. 30 & 31 Eliz. in B. R. *Greshams* case. acc. *Moor* 907. So 6 E.4.3. in an action of Trespas brought by a Vicar for taking of his goods; the defendant pleaded, that I. S. was Parson of the same Church, and that the goods were Tythes severed, and that he as the Parsons servant took them; the plaintiff replied, that he was Vicar of the same Church, and that he and his predecessors Vicars, had used to have the Tythes, as belonging to the Vicarige, and traversed that they were the goods of the Parson; the defendant demanded the jurisdiction, because that otherwise the right of the Tythes would in that action be tried betwixt them. It was the opinion of the whole Court, that as this Case was, the Court should not be ousted of the jurisdiction, because the plainriff could not have his action against the defendant in
the

Vid. *Cook*, Se-
lect Case 18.
in the Case of
Modus Deci-
mandi. acc.
38 H.6. by
Fortescue.
35 H.6.39.
14 H.4.17.a.
29 Eliz. in B.
R. *Godbolt*. 45.
acc.
Pasc. 29 Eliz.
in Co.B. The
Parson of
Facknams
Case. *Leon*.
1. part. 58.
Vid. 22 E.4.
23, 24. acc.

the Spiritual Court, nor the defendant there against him, because they were not both Spiritual persons betwixt whom the right of the Tythes could be tryed in the Spiritual Courts; but in all actions, if it appeareth by the plea in bar of the defendant, or by the plaintiffs Replication, that the right of the Tythes doth come in debate, if the persons be of ability to sue there, the Temporal Court shall be ousted of the jurisdiction; by which Cases it appeareth, that by the Common Law no person was capable of Tythes but a Spiritual person, nor could any sue for the same in the Ecclesiastical Court, except he was an Ecclesiastical person betwixt whom the right of Tythes was only tryable; but yet at the Common Law, the King being *persona mixta cum Sacerdote*, as it is said in 10 H. 7. was capable of Tythes, and his Patentee by his prerogative, as appeareth by the Case of 22 Ass. 75. before-cited: where the King having Tythes in the Forest of *Rockingham*, did by his Letters Patents grant the same unto the Provost of C. who thereupon brought a *Scire facias* against the Occupiers of the Lands within the Forest to have execution of those Tythes; and the Writ was allowed, although the execution was afterwards stayed for some other cause; and the cause perhaps might be, for that the said Provost was not an Ecclesiastical Person (for there were many

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many Lay-Provosts) *idro quare* that Case and the Record thereof.

Now although a meer Lay-man, Monks, who as *Bede* saith, were *mere Laici*, were not capable of Tythes by the Common Law in pernanicie, and as to sue for the same in the Ecclesiastical Court yet by the Common Law a meer Lay-man was capable of a discharge of tythes; and that two ways: First, by grant of the Parson; and secondly, by composition: for although a meer Lay-man could not, nor can at this day prescribe in *non decimando*, as it is said in *Cook* 2 part, in the Bishop of *Winchesters* Case, and in 8 E. 4. 14. by *Choke*, yet may he prescribe in *modo decimandi* to pay a composition to the Parson in lieu of all his Tythes; and such composition shall binde the Parson; and although they in the Spiritual Court will not allow of any plea in discharge of Tythes in their Courts, as it is said in *Doctor and Student* 177. and in 8 E. 4. 14. by all the Serjeants; yet upon a surmise and supposition of a *modus decimandi* in the Kings temporal Courts, a prohibition shall be awarded unto the spiritual Court to stay their proceedings, until the *modus decimandi* be tryed in the Kings temporal Court. *Pasc. 43 Eliz. Cro. 3. part.* In *Beal and Webs* case: If a *modus* be alledged, although it be found to differ from what is alledged by the Deft. in the Spiritual Court, yet a prohibition shall be;
be-

because it is *modus decimandi*. Mich. 14 Jac. Wintel and Childs case, Balstr. 3 part, 220. If a Vicar sue for Tythes in the Spiritual Court, a *modus* pleaded there, to pay yearly so much to the Parson, will not discharge the payment of Tythes to the Vicar. Vid. Cook, Select cases, 7 Jac. 45. acc.

Vid. Hil. 38 Eliz. Wrights case, Moor 425. Upon a Prohibition: upon a Prescription of a *modus decimandi*, the Defendant in bar pleaded and traversed *abfque hoc*, that the Spiritual Court refused to accept of the plea upon the prohibition. It was adjudged a void Traverse, because the prohibition is not founded upon the misdemeanor of the first in holding of the plea, but upon that, that there Law cannot render right to the party upon the plea of Tythes; so as the Tythes is the substance of the suit, and therefore the refusal of the plea is not material.

Mic. 33. Eliz. in the Kings B. in a prohibition sued by the Bishop of Lincoln against Cooper, who sued him in the Spiritual Court for Tythes, the Bishop suggested, that he and his Predecessors were seised of the Mannor of D. and that as long as it was in their possessions, had been discharged of Tythes; and that the Mannor in the time of E. 6. was conveyed to the Duke of Somerset in fee, and afterwards was regranted to the Bishop and

and his Successors : In this Case it was objected, that the prescription was not good *de non decimando* ; and it it was good, yet it was interrupted by the seizure of the Duke ; and although that the Mannor was re-assured, yet that the prescription was not revived : But it was resolved by all the Justices, that the prescription was good in the Case of a spiritual person, but not in the Case of a common person ; and that in this Case the prescription was not gone by the interruption, for that Tythes are not issuing out of Lands, neither can unity of possession extinguish them, nor were they extinguished by a release of all right in the land.

V.d. Cook 11.
part, Priddle
and Nappers
case. acc.

In 38. E. 3. A Prior impersonce did grant unto I. S. that he should not pay Tythe of corn or grain growing upon such lands ; and the grant was holden good, and did binde the Prior : so in 38 E. 3. Jurisdiction 44. the Prior of R. S. and his cosecrers for taking of his corn ; the defendants pleaded, that the Prior was Parson of the Town where the corn grew, and that their lands were not tythable, by reason of a composition made betwixt them and the Prior for the tythes of their lands ; and in that Case it was adjudged, that if the action be brought for the Tythe of the land, that the composition pleaded will be a good bar to the

38 E. 3. grants
84.

38 E. 3. Jurif.
diction 44.

to the action. And it appeareth by the Register, fol. 38. that a man may be discharged from the payment of Tythes by composition made with the Parson or Vicar, and it is usual, as by many Cases hereinafter it shall appear.

If the Lord of a Mannor grants parcel thereof to the Parson in fee by Indenture, and the Parson by assent of the Ordinary (without the Patron) grants to him that he shall be quit of Tythes of his Mannor for that parcel of land. If he or his assigns do sue in the Spiritual Court for Tythes of the Mannor, he shall give a prohibition upon that deed. *Cook, Select Cases, 18. Vid. Mich. 25 H. 3. Parl. rot. 5. Samson Fobet and the Parson of Smyndens case. acc.*

Modus Decimandi, is, When Lands, Tenements, or Hereditaments have been given to the Parson and his Successors ; or an annual certain sum, or other profit, always time out of mind to the Parson and his Successors, in full satisfaction of all the Tythes in kinde, in such a place. *Cook, Select Cases. 40.*

Pasc. 14. Jac. Pringe and Childs case. Moor. 780. A composition is betwixt the Parson and the Vicar upon the Appropriation for the petit Tythes : It was adjudged that a prescription for the Parson against the composition was not good. *M. 31 Eliz. C. B. Nash and Molins case, Cro. 3-part, 206.* A Spiritual person may pre-

scribed in *Non Decimando*. See in the case of *Modus Decimandi*: *Cook*, Select cases. Mich. 6 Jac. Co. B. and *Doctor* and *Student*. It is holden, Where Tythes have not been paid on Underwoods under 20 years growth (as there in the wild of *Kent*) no Tythes shall be paid for the same. *Ibid.* Although a Lay-person cannot prescribe in *Non Decimando*, yet satisfaction may be given in discharge of payment of Tythes, by a *Modus Decimandi*; which *Modus* is tryable at the Common Law.

Nota. M. 25 Eliz. *Branches* case. *Moor* 219. If an Abbot or Prior be seised of lands discharged of Tythes; he who is now Farmor of such Lands shall be admitted to prescribe in *Non Decimando*, by the Statute of 2 E. 6. which is, That none shall pay Tythes, otherwise than they were paid 41 years before.

Now although it be agreed, that a meer Lay man cannot prescribe in *non decimando*, not to pay any Tythes at all, for that such a prescription would be against the the Law of God, Tythes being due *ex jure Divino*: yet the opinion of the *Student* in his Discourse of Tythes, *Doctor* and *Student*, 167. is, that a County may prescribe to be quit of the Tythe of corn and grass, so as the Vicar or Curates have sufficient portions besides to live upon; but if one man of a Town would prescribe to be discharged of tythe of corn and grass, such a prescription

Q would

would be utterly void, unless he did shew that he did recompence the Parson or Vicar some other way; but one man in a Town may prescribe to pay a certain pension to the Parson or Vicar yearly in lieu and contentation of all his tythes; and such a prescription hath been adjudged good, *Mic. 40 Eli. in Pigot and Hearn's Case*; and *vide Mic. 15 Car. in B. R.* where it was adjudged, that a Hundred might prescribe in not payment of tythes, upon the reasons aforesaid; but a Parish or a particular Town cannot prescribe in *non decimando*.

A spiritual person may prescribe not only in *modo decimandi*, but also in *non decimando* not to pay any tythes at all; and Lands may be discharged of tythes in the hands of spiritual persons, and now since the Statute of 31 H. 8. in the hands of the Kings Patentees, by suspension, priviledge or unity.

The Bishop of *Winchester* prescribed, that he and all his predecessors there, farmers and tenants had holden a Mannor, and the demeasnes and the lands thereof exonerated, acquitted, and discharged of and from the payment of tythes; and the prescription was adjudged good, and that it was good as well for his tenants and farmers as for himself.

30 H 8 Dyer
43.

If a Parson purchaseth a Mannor or Lands in a Parish whereof he is the Parson,

Parson, the tythes of this Mannor and Lands are suspended whilst the Mannor, and Lands, and Parsonage remain in his own hands or occupation, because he cannot pay tythes to himself; but if afterwards he maketh a Feofment in fee of the said Mannor or Lands, or leaseth them out for years unto another, there the purchaser or lessee shall pay tythes to the Parson, and he shall have tythes of the Lands against his own Feofment or lessee; for that tythes being due *ex jure divino*, must be paid unto whose hands soever the Mannor or Lands come, unless they come to the Parson himself, or unless the Parson to whom the same do come, can plead to be discharged from the payment of tythes for the said Mannor or Lands by some special privilege.

An Abbot and his Covent, or a Prior and his Covent, might have been discharged from the payment of tythes; but if all the Monks had died, and the Abbot and Prior also, so as there had been a dissolution in Law of the Abby or Priory, if the Lands had come to other persons, the occupiers or owners of the Lands should have paid tythes, as it was adjudged, *Mic. 11 Jacobi* in the Court of Common Pleas, in the Dean and Chapter of *Windsors* Case.

The Cisterrians, Templers, and Hospitallers by their Order were to defend the

p. 13 E.H. in Harpers Rep.

Christians against the Infidels, and had a privilege granted unto them by Pope *Adrian* in the Council of *Lateran* (which privilege was restrained onely to those three Orders; and which Orders our Laws onely took notice of) *ut decimas prædiorum suorum quæ in manibus suis propriis excolunt non tenentur solvere*; which must be so averred, as it appeareth by *Cook* in his new Book of Entries, f. 542.

Vid. Whitton and Westons case, in B. R. *Bridgman* 32. The Clause of Discharge of payment of Tythes by the Statute of 31 H. 8. doth extend to the Knights of the Order of *St. John of Jerusalem*.

Vid. Hill 2 Jac. B. R. Cro. 2 p. 157. *Cornwallis and Spurlings case*, where lands of the possessions of the Priory of *St. Johns of Jerusalem*, which came to the King by a special Act of 22 H. 8. were not discharged from payment of Tythes.

This was but a special privilege for the Lands in their own Manurance, for the maintenance of Hospitality, and had many restrictions: as first, It extended onely to such Lands as they had at the time of the said Council, and for so long time onely as the same remained in their own possessions: but if Lands had been purchased by them after the said Council, the immunity for such Lands did not extend to them, as it was said, *Pase. 16 Jacobi* in Co. B. in *Potter and Bathursts Case*;

Vid. Cro. 2 p.
the Case.

Cafe; and so it was if Lands had escheated unto them after the said Council, the privileged did not extend to such Lands; for it was but a special privilege, and was therefore to be taken strictly, as it was adjudged in *Hedysons* Cafe, 8 Car. which Cafe see in *Claytons* Reports, 181.

The Abby of *Fountains* was of the Order of the *Cisterians*, and 11 *Johannis* before the Council gave Lands to one *Kerby* to hold of them by tealty, &c. and afterwards in 36 E. 3. those Lands did escheat unto the Abby: it was resolved in this Cafe in the Court of Common Pleas, in Sir *Thomas Dickenson's* Cafe, that for those Lands so escheated tythes should be paid, like unto the case of 29 E. 3.

Quinzim 1. where Lands are holden of an Abby discharged of the payment of *Quinzim*, and afterwards the same lands com: to the Abby, the Abby shall pay *Quinzim* for those lands. 11 H.4. *Quinzim* 5. acc.

See *Hill*. 1 Car. in an Attachment upon a prohibition between *Dickenson* and *Greenbow*, which case see in *Pophams* Reports 156. Those who were of the Order of the *Præmonstratenses*, claimed the privilege to be discharged of tythes, which they said was granted unto them by the Pope, but was never confirmed by any Act of Parliament in this Realm; it was for part of the Possessions of the Abby of *Cockermun* in *Lancashire*, which

afterwards was surrendered and came to King *Hen.* 8. It was a question if this grant of priviledge was good or not; it was much doubted of, and not resolved by the Justices; for it was said that it appeareth by the Book of 11 *H.* 4. That the Pope could not by his Bulls, Councils, or Decrees, alter the Laws of the Realm. It was much insisted upon for the allowing of this priviledge unto them; for that that this Bull of the Pope granted unto them, was confirmed unto them, 24 of King *John*: and that it appeareth in a Record, 22 *E.* 1. Rot. *Membrana.* 5. that the King took them and their Immunities into protection; and that in 22 *R.* 2. *John* of *Gaunt* having *jura regalia* in the County of *Lancaster*, confirmed this Bull unto them likewise; and for these reasons it was strongly urged, that those of the said Order of *Præmonstratenses*, were at the time of the said Statute of dissolution *de facto* discharged of tythes, though it was not *de jure* a good discharge within the said Statute of 31 *H.* 8. *Quere*, for the Case was not resolved by the Justices.

And that the Lands which the Houses of those religious Orders before mentioned purchased after the said Council of *Lateran*, or which afterwards escheated unto them, were not priviledged, appeareth by the Statute of 2 *H.* 4. cap. 4. whereby it is enacted, that the religious Houses

Houses of the Order of the *Cisterians*, which had purchased Bulls to be discharged of tythes, should be in state they were before, and that against those that took advantage of *them* proces of *Præmunire* should be awarded; by which Statute it appeareth, that they intended to have discharged the Lands of tythes which came to them after the said Council, but that the Laws of the Land would not allow of such Bulls for discharge, or extend the priviledge unto other Lands then what they had in their own Manurance at the time of the said Council. 2. The priviledge was but special for the Lands in their own Manurance; for if they had leased out those lands to Farmers for rent, if it had been but for years or at will, yet the Farmers or Occupiers of those Lands should have paid tythes; for by the Leases the Leasors had admitted the occupation of the Lands to be in the Leases; for upon such possessions they might have maintained actions of Trespals: and so it was adjudged, 10 *Jacobi* in the Common Pleas, in *Jaggard* and *Huttons Case*. 2 *Leon.* 71. Countess of *Lenox* case, *Manwoods* opinion that the Queens Tenants at Will or yearly should hold *Cisterians* Lands discharged from tythes. 3. The priviledge was but special, and did not extend unto new erections upon Lands which were priviledged. And whereas by the Law, and

Vid. 18 *Elix.*

Dyer 349.

Cook 2 *pa.* 44.

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Vid. 18 *Eliz.*
Dyer 349.
Cook 2 *pa.* 44.

Vid. Tr. 14
Jac. B. R. Jakes
Case. Bolivar.
 3 part, 212.

the antient constitutions of the Church, of antient Mills, Tythes were not paid: but by the Statute of *Articuli Cleri*, cap. 5. for Mills newly erected Tythes shall be paid; it was adjudged Trin. 14 Jac. in the Kings Bench, in a Case of Prohibition, That where a Parson did libel in the Spiritual Court for the Tythes of a Mill which was erected upon lands discharged from the payment of Tythes by force of priviledge within the Statute of 31 H. 8. that a prohibition would not lie in the Case, for that *de molendino novo erecto* Tythes should be paid. *Vid. Moors Reports* 534. M. 41 Eliz. in *Benton & Trotts* case, by *Popham*. *Vid. Trin. 23 Eliz.* in *B. R. Knightly & Spencers* case. *Leon. 1 part. 331. acc.* *Vid. Nash & Mellins* case. *Mich. 33 Eliz. B. R. Leon. 1 part. 241. acc.*

Unity of possession of the Parsonage and lands which should pay Tythes by Appropriation or otherwise in the hands of Religious and Ecclesiastical persons had discharged them from the payment of Tythes; and now at this day by the Statute of 31 H. 8. cap. 13. such an unity of possession in the hands of the persons of such Religious Houses, shall be a discharge for the Kings Patentee from the payment of Tythes for the Lands that came to the Crown by the said Statute: but then such an unity in the said Religious and Ecclesiastical persons, must have been *justa*, &

qua-

qualis, libera, perpetua, as it is said in Cook, 11. part, in Priddle and Nappers Case. Vid. M. 28 Eliz. Branchers Case, Moor 219. 1 Eliz. in B. R. Gibson and Holcofts Case. Telverton. M. 40 Eliz. Cro.

1. part, Barton and Cories Case. For if either the Parsonages or the Vicariges Lands or Tythes had come, or had been united unto their houses by disseisins, or other tortious and unlawful acts, such an unity had not been a good discharge within the said Statute. 2. It must have been *equalis*, there must have been a fee-simple both in the Lands, and in the Tythes, or Parsonage, *simul & semel* in them; for if the Abbots, Priors, or other Religious persons had held but by lease,

that had not been such an Union as the Statute intended. 3. It must have been *libera*, free from the payment of Tythes; for if their Farmers, Tenants at Will, or years, had paid Tythes, that had not been a sufficient unity to have discharged them from the payment of Tythes. And lastly,

It must have been *perpetua*, time out of minde; and then for the infinite impossibility and impossible infiniteness, that such immunities and discharges that such Religious persons and houses had before-time of memory, could not be known; such an unity had been a good discharge in their own hands, and at this day such an unity is a good discharge for the Kings Patentees within the Statute of 31 H. 8.

Mich. 38 Eliz.
in B. R. Green
and Boskins
Case. Moor
420. acc.

In

In 17 *Eliz.* in the Kings Bench, the Case was ; an Abbot held a Parsonage Inappropriate which was discharged of Tythes, and he purchased parcel of the Lands, so as the Tythes thereof were suspended in the hands of the Abbot ; afterwards the possessions of the said Abby came to the King by the Statute of 31 H. 8. of Dissolutions : the Question was, whether the lands so purchased by the Abbot before his surrender of them to the King upon the Statute, were discharged of Tythes : in this Case it was the opinion of Mr. *Plowden*, that they were not discharged : for he said, that no lands were discharged, but such as were lawfully discharged by right composition, or other lawful thing ; and in the said case the lands were not discharged in right, but suspended only during the time that they were in the Abbots hands. *Quere*, for the Case was not resolved.

Vid. Pasch.
5 *Eliz. Moor.*
Reports 50.

Mic. 33. *Eliz.* in the Kings Bench, *Nash* and *Allens* Case. In the Case of a prohibition the party did surmise, that the lands were parcel of the Priory of *Creechurch*, which came to the Crown by the Statute of Dissolutions, and that the Prior held them discharged of Tythes at the time of the dissolution ; upon which issue was joyned : it was moved in this Case, that there was not any discharge set forth, as by composition, unity of possession, privilege of order, &c. but it was the opinion of

of the whole Court, that although that the special manner of the discharge was not set down in the pleading, yet the Court ought intend it to be a lawful discharge, as composition, &c. for that the King should hold as the Prior held, and it ought to be taken that it was a lawful discharge *tempore dissolutionis*.

But such lands as came to the Crown by the Statute of 27 H. 8. of Dissolution, shall at this day pay Tythes, although that the lands in the hands or occupation of the said Religious houses were discharged from the payment of Tythes; for that the priviledges being personal priviledges, were extinguished by the said Statute of Dissolutions; and there are no words in the said Statute of 27 H. 8. to save the priviledges; and the Statute of 31 H. 8. being a subsequent Law, had no retrospect to those priviledges, and so it hath been adjudged in all the Courts at Westminster by all the Judges of England, viz. 15 Jac. in Co. B. in Garret and Wrights case; and 7 Car. in the Kings Bench, in Clark and Wards case. Mich. 11 Car. in B. R. Cro. 3 part, Sydow and Holms case, adjudg. acc.

Tythes then being meer spiritual things, due *ex jure Divino*, recoverable only (as Tythes) in the Spiritual Court, and payable by all persons, unless discharged by prescription, suspension, priviledge or unity : Let us now see of what things Tythes

V. Sir Marmaduke Stricklands Case, 1639. at the Assises at York adjudged accordingly. V. Claytons Reports 117. And v. 12. Car. there adjudged acc. in another Case.

Tythes shall be paid, and of what not ; and what shall be a sufficient composition or *modus* paid in lieu of Tythes, and how long and how far such composition or *modus* shall binde the present Incumbent for the Tythes.

All Tythes are Prædial, Personal, or Mixt ; Prædial Tythes are such as increase yearly of the ground, such as are Corn, Grain, Grass, Hopps, Saffron, Wood, Hemp, Flax, and other profits arising meerly of the Ground ; and these may be distinguished into *Decime Majores*, & *Decime Minores*, or *Minute Decime*. *Decime Majores* do belong to the Parson only : But *Minute Decime*, such as Saffron, Wood, &c. do belong unto the Vicar, as hath been adjudged, Pasc. 38 Eliz. B. R. in *Beding and Feaks* case : and *Mic. 1 Car.* in Co. B. in *Sir Richard Udal* and the the Vicar of *Attons* case. Personal Tythes, are those that are paid of the profits of such things as are gained by the Industry of Man. Mixt Tythes, are those that are called Prædial Mediats, as Calves, Lambs, &c. which come not immediately of the ground, but proceed of things maintained out of the ground : of all these sorts Tythes shall be paid, but with this *Proviso* or Limitation, that the party who is to pay the same, have a property in them : For of things which are *freæ naturæ*, and of which a man hath not any absolute property, or of things which are meerly for

Moor 909.

for pleasure, Tythes shall not be paid; and therefore of Apes, &c. Tythes shall not be paid.

Tythes shall be paid of Partridges and Pheasants, but they are not Prædial, but personal; so it is of Conies taken in a Warren, and of Doves in a Dovehouse. Mich. 38 Eliz. *Hugton* and *Princes* case. It was holden Tythes should not be paid of tame Turkeys, Peasants or Partridges, because *fera natura*. *Moor* 599.

If a man stealeth Conies out of a Warren, or Doves out of a Dove-house, he shall not pay Tythes of them, because he is not the lawful Owner of them, and the Law gives him no propriety in them; and the rightful Owner of them shall not pay Tythes of them, because he hath not the profit of them.

Hill. 16 Jac. in B. R. in a prohibition between *Dawdridge* and *Johnson* Parson *532.* *crs. 2. part.* of *Buckfield*. the case was, A Parson libelled in the Ecclesiastical Court for Tythes of a Fulling Mill, and suggested, that the Defendant the Miller fulled every week forty Cloaths, and did gain for every cloth 2s. wherefore he demanded the Tythes of them. In this Case a prohibition was granted by the Court, for that by the Law of the Land he ought not to pay Tythes of them; nor were Tythes to be demanded of such Mills: For of such such things as come only by the labour of Man, Tythes are not payable, but of things

things renovant only. Resolved, No personal Tythes by the Statute of 2 E. 6. is to be paid for Mills; but where the same by special usage hath been paid. Tr. 14 Jac. B. R. *Bolstr.* 3 part 212. *Jakes* case.

Tythes shall not be paid of Quarries of Stone, Tyle, Brick, Lyme, Gravel, Clay, Chalk: so it was adjudged, Mich. 19 Eliz. in B. R. and Pasc. 34 Eliz. in Co. B. in *Liff* and *Watts* case, for that these are parcel of the Inheritance, and the Parson or Vicar have Tythe of the Grass or Corn growing upon the same Lands, and the Land shall not pay a Double Tythe: and *vid.* 20 Eliz. by *Wray*, and all the Judges, that Coals are not Tytheable, and therefore that a prescription de *Non Decimando* of them is good. Pasc. 41 Eliz. B. R. *Johnson* and *Ambreys* case. Cro. 3 part 660. acc. *Moor* 910. Vid. Mich. 14 Jac. B. R. *Passe* and *Parker* case. *Bolstr.* 3 part. 242.

Tythes shall not be paid of After-pasture, where Tythes have been paid before of the Grass of the same ground, unless that by covin there be left more Grass standing upon the ground with an intent to deceive the Parson, then there hath been wont to be left; and so it was holden Mich. 6. *Jacobi* in Co. B. in *Smiths* case; and so it is of the rakings of Corn or Grain, as it was likewise adjudged Mic. 7. *Jacobi* in C. B. for that by the Law

Pasc. 34 Eliz.
C. B. *Liff* and
Watts Case.
Moor 908. acc.
Cro. 2. p. 277.
Register 55.
Br. Dismes 18.
Pasc 4 Jac. B.
R. *Green* and
Austens Case.
Tel. 86.
20 Eliz. B. R.
by *Wray*.

Mic. 6 Jac.
C. B. *Smiths*
Case.
Mic. 7 Jac.
C. B. adjudge.

Law of *Moses*, none ought to rake their Grattens, but ought to leave them for the Poor and Orphans, and the Law will not give to the Parson or Vicar Tythe of that which is appointed for Almes.

cook 2 part, Instit. 652. b.

Vid. The Lord *Howard* and *Nichols* Case, *Leon.* 2 par. 28. acc. *Pasc.* 2. *Jac.* in B.R. *Hull* and *Festyplaces* Case. 2 *Cro.*

42.

Tythes shall be paid by the Inne-keeper of Pasture of his Guests Horses; But if the Inne-keeper taketh a Crop of Hay, and afterwards puts his Guests Horses into the Grounds to pasture, Tythes shall not be paid: *Trin.* 16 *Car.* in B. R. *Richardson* and *Cabells* case, adjudged accordingly.

Tr. 16 Car. B. R. Richardson and Cabells Case. Poph. 143.

Tythes shall not be paid of the Roots of a Coppice-Wood grubbed up, but by Custom.

Mic. 15 Car. in B.R. Skyngers Case, adjudged acc.

If Lands lie fallow every second or third year, the same is a charge to the Owner or Tenant for that year, and an Advantage to the Parson or Vicar in the bettering the Crop the year when the same is sowed with Corn or Grain; and therefore although the Grass, and seeding of the Fallow ground be for that year some small profit to the Owner of the Soil, yet he shall not pay Tythe for the same: and therefore if barren Cattel be kept upon the Fallow, or upon the Stubble, no tythe is due for them: But if the Land be Tytheable, and the Tenant

Pasc. 7 Jac. in Co. B. adjudged acc.

nant

15 Car. in B.
R. by Barkley
Justice.

nant thereof will not plough or manure it, to prevent the Parson or Vicar of his Tythe which might arise of the same; it was holden by Barkley Justice 15 Car. in the Kings Bench, that the Parson might sue the tenant for Tythe of it in the Ecclesiastical Court: But *Quere* of it.

Tythes shall not be paid for beaſts of the Plow or Husbandry: But if a man keepeth Cattel upon his Grounds until they be ready for the pail, and afterwards ſelleth them, and makes profit of them, Tythes ſhall be paid for them, Mich. 8 Jacobi, in Com. Banc. Baxter and Hopes caſe adjudged accordingly; and *vid.* 2 Car. in B. R. in Pophams Reports, 197. where it is ſaid by Whitlock Juſtice, *De animalibus inutilibus*, the Parſon ſhall have the tenth of the Bargain for depaſturing, as Horſes, Oxen, &c. but *de animalibus utilibus*, he ſhall have the tenth *in ſpecie*, as Cows, Sheep, &c.

M. 31 Eliz. B. R. Perry and Soams Caſe. Cro. 3. par. 139. In a Suit for Tythes of green Tares eaten by their Plough-Cattel; it was alledged they had not ſufficient Meadow and Paſture in their pariſh: It was holden a good preſcription in diſcharge of their ſaid Cattel for the Tares eaten by them. *Vid.* Mic. 10 Car. B. R. Cro. 3. par. Meade and Thurnams Caſe adjudged, *acc.* But *Vid.* M. 2 Jac. Cro. 2 p. Webb and Sir Henry Warnors Caſe, a Cuſtom alledged, to take Fenny

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Fenny Fodder for the substance of their Beasts, for the better service of their Husbandry, and to pay no Tythes of it; was adjudged to be no good Custome.

The Parson of a Church libelled in the Spiritual Court for the tythes of a Riding Nag: the Case was this; A man let his Land, reserving the running of a Horse at some time when he had occasion to use him there. It was said by the Court in this Case, that nigh London a man will take a hundred or two hundred Horses to graze. and if he should not pay tythe for them, the Parson should be defrauded; But it was said that if the Defendant did prove it was a Nag for labour, and not for profit, then in such Case a prohibition would lie, otherwise not.

Tr. 15 Jac. in B. R. Lawking and Wildes Case. Poph. 126.

V. Tr. 9 Jac. in B. R. Potbill and Mays case adjudged acc. Bolstrods 1 par. 171.

If Underwood be employed for the fencing of the Corn which is sowed upon the Land, for the preserving of the pasture from spoil by Cattell or otherwise, the Parson shall not have tythe of it, as it was adjudged, *Hill. 15 Jac.* in the Common Pleas, in *Hyde and Ellis Case*: and if there be a Parson and Vicar in one Church, and the Vicar hath tythe-Wood, and the Parson hath the tythe of the Pastures, and Wood is felled and Employed in the making of the Fences, and for the Inclosure of the pasture-ground from the hurt of Cattell, there the Vicar shall not have tythe of the Wood which is felled for the same Inclosures, as it was holden also in the same case.

Coole Select Cases 16. acc:

Hill. 15 Jac. C. B. Hyde and Ellis case.

Vid. Moors Reports. Page 14 Jac. Lanes case adjudged, acc.

R

If

*Mic. 15 Jac.
C. B. White
& Bickerstaffs
Case.*

If Wood be cut down and Employed for Hop-poles, where the Parson or Vicar have tythe of the Hops, they shall not have tythes of the Wood which is felled for the Hop-poles; as it was holden in *White and Bickerstaffs Case, Mic. 15 Jac.* in the Common Pleas: and it was there said by *Hobart* Chief Justice, that if a man hath a great Family, and much Wood is cut down and spent, and burnt in his house-keeping, that tythes shall not be paid of such Wood.

Vid. Moor, p. 910. Green and Handlites case. That a prescription to pay one penny called a Harth-penny in satisfaction of all combustible Wood, was a good prescription. *Vid. Pasch. 40 Eliz. in B. R. Austin and Lucks case,* Tythes shall not be paid for fewel spent in any house.

*Tr. 4 Car. C.B.
Norton and
Faymors Case.*

Trin. 4 Car. in Co. B. in Nortons and Farmors case, It was moved, to have a prohibition for to stay a Suit in the Spiritual Court for tythe-Wood, upon surmise that the Wood was spent in his house for firing, and shewed that the Custome of the parish is, that the Owner of any House and Land in the said parish who pay tythes to the Parson, ought not to pay tythes for Wood spent for fewel in their houses. The issue being joyned, upon the Custome, it was found for the Defendant: It was moved in stay of Judgement, that although it be found that there is no such Custome, that they ought not

to pay tythes for Wood spent in their houses; yet *per legem terræ* they ought to be discharged of the same: But it was resolved by the whole Court, that it is not *de jure per legem terræ*, that any be discharged of them. For it is usual in prohibitions to alledge Customs; Or by reason of other Lands whereof he pays tythes, that he is discharged of that kinde of tythes, but not to alledge that *per legem terræ* he is to be discharged; and the Plaintiff in the prohibition in this case having alledged a Culome, the same being found against him; it was adjudged for the Defendant, and for that cause only the prohibition was denied, and consultation awarded.

Mr. Fitzherbert in his *Natura brevium* 53. is, that no tythe shall be paid for Agiltment of Cattel: But now the Law is taken to be otherwise, and so was adjudged, *Mic.* 38 *Eliz.* in Co. B. in *Gryfman* and *Lewes* case: which see *Cro.* 3 part 446. and it shall be paid by the Owner of the Lands, and not by the Owner of the Cattel: and the reason thereof is, for that the Parson or Vicar may not know whose Cattel they are, and therefore the best shall be taken for the Church, and that which is most certain; and therefore the tythe for them shall be paid by the owner of the soil who agists the cattel: and so it was agreed by *Foster* and *Cook* Chief Justice in their

Mic. 8. Jac.
C. B. Baxter
and Hopes
Case.

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argument of *Baxter* and *Hopes* case, Mic. 8 *Jacobi* in the Court of Common-Pleas.

If sheep die after they be shorn, before the Feast of Easter next following, tythe shall not be paid of the wool of those sheep. 1. Because they are but of small or no value, *et de minimis non curat lex*: And 2. Because that the owner of the sheep hath paid tythe for them the same year, and there shall not be a double tythe paid for one thing in one year, as before is said. 3. Tythe shall be paid of the clear profit only; but if the sheep do die before the Feast of Easter, all the profit of them is lost; and therefore for to demand tythes of them, were but *affixionem addere afflictio*: And tythes shall not be paid of the Pelts or Fells of sheep which die of the rot without a special custome so to do; and so it was adjudged, Tr. 3 Car. in the Kings Bench, in a prohibition, betwixt *Ashton* and *Wiler* Vicar of *Kilmonsden* in the County of *Somerset*, where the Vicar libelled in the Spiritual Court for the tythe-wool of sheep which died of the rot, and a prohibition was awarded; but *Quare* of the first of these cases; for by Mr. *Fitzherbert* in his *Natura Brevium*, Consultation 51. g. The Parson by prescription may claim tythe of Wool of the sheep of the parishioners, killed & dying from *Mich.* to the Feast of *Easter*, and may sue for the same in the Ecclesiastical

cal Court: *Ideo Quare*; and shall have a consultation, if a prohibition in such case be awarded.

A custome was alledged to pay Tythe in kinde for sheep if they continue in the Parish all the year; but if they be sold before shearing-time, then to pay but *ob.* for every sheep so sold: it was in this case holden by the whole Court to be a very unreasonable custom; for in such case the Parson should be defeated of his Tythes, *Pasc. 17 Car.* in C.B. in *Weeden* and *Hardens* case: see *Mic. 2 Car.* in B. R. in *Pophams Reports* 197. acc. *Vid. Mich. 14 Jac.* B. R. *Fosse* and *Parks* case. Tythes shall be paid of Neck-wool of sheep. But if a custome be alledged, and proved, that in consideration they did winde up the other Fleeces at their own choice, there if they sued in the Spiritual Court for the Tythe of the Neck-wool, they may alledge the same custome for their discharge of such Tythe; and if they will not allow it, a prohibition will lie, *Boltr. 3 part, 242.*

If ground be barren *suapte natura*, *Mic. 11 Jac.* in Tythes shall not be paid of it; but if *Co. B. She-* ground be barren, and Tythe-wool and *ringtons Case.* Lamb have been paid for the same by the *2 Eliz. Dyer* space of thirty years together, and afterwards by manurance and the labour of man the same is made fertile, and doth bear corn and grain, the owner of the lands for 7 years shall pay such Tythe for *170.*

Hill. 18 *Eliz.*
B. R. *Sherring-*
tons and Fleet-
woods Case.
V. 15 *Car.* in
B. R. *Sugden*
and *Cottels*
case acc.

the same as he paid before : but if a marsh or meadow by accident, by inundation, or by ill husbandry, be over-run with thorns, bushes, &c. yet the same is not barren ground, but the Parson shall have Tythe of it, as was holden *Hill.* 38 *Eliz.* in the Kings Bench, in *Sherrington* and *Fleetwoods* case. *Moor* 909. Vid. *Pasc.* 14 *Jac.* B. R. *Witt* and *Bucks* case. *Bolstr.* 3 part. 165. acc. If one gain Land from the Sea, which after bears good corn, Tythe shall be paid of it, though it bore no grass before. *Mich.* 28 *Eliz.* Fenny-ground drayned, shall pay Tythes, *Moor* 430.

Mic. 29 *Eliz.*
in B. R. adjud.

Tythes shall be paid of heath, furs, and broom, unless the party setteth forth a prescription or a special custome not so to do; that time out of mind there hath been paid milk, calves, &c. for the cattle that have been kept upon the same lands; for then Tythes shall not be paid of the heath, furs, or broom : and so it was adjudged *Mich.* 29. *Eliz.* in the Kings Bench.

11 *H. 4.* 89.
30 *E. 3.* 10.

Of Trees of the age of twenty years growth or above which are *Timber-trees*, Tythes shall not be paid : but of *Sylvæ Cedua* and Underwoods, Tythes shall be paid, but not of great Trees, by the Statute of 45 *E. 3. cap. 3.*

Now what shall be said to be *Sylvæ Cedua*, and what Timber-trees, hath been a Question, both by the Canon and Com-

mon

mon Lawyers. *Linwood*, lib. 5. fol. 26. *Decimæ de sylvis ceduis, ut de frumento persolvantur, circa quæ minus quam circa fructus agrorum laboris impanitur. Et ibidem declaramus provisione concilii sylvam ceduam illam fore quæ cujuscunque generis existens arborum in hoc habetur ut cedatur, & quæ etiam succisa ex stipitibus & radicibus enaseitur.* And *Belknap* 50 E. 3. 10. In *Sylva cedua* is included all manner of Wood which is able to be cut, and which by good keeping may grow again.

The misinterpretation of these words (*Sylva Cedua*) gave occasion to Parsons and Vicars in the time of King E. 3. to sue for Tythes of great Trees and Timber-trees under the name of *Sylva Cedua*: for the Declaration and explanation of which, the Statute of 45 E. 3. cap. 3. was made, by which it is said, Whereas the great men and Commons sell their Woods at the age of twenty years, or of greater age, to Merchants, to their own profits, or in aid of the King in his Wars, Parsons and Vicars do implead them in the Spiritual Court for the Tythe of the said Woods by the name of *Sylva cedua*; it is ordained, that a prohibition in this Case shall be granted, as hath been used before this time.

Now 50 E. 3. 10. by *Belknap*, it was *Plew. Com.* never seen, saith he, that of great Trees *470. b. acc.* or of Timber-trees, Tythes were demanded; which the Court agreed; and by *Cook*

11 p. 48. in *Lifords* case. The words in the Stat. of 45 E. 3. and the Book 50 E. 3. viz. (great trees) must be intended Ash, Oak, Elm, of all which as well before the Stat. of 45 E. 3. by the Common Law, as since, if they were of the age of twenty years growth, Tythes was not to be paid, because they of their nature were only accounted Timber-trees, and fit for building: but of Sallows, Willows, Maples, and the like, although they be above the age of 20 years, yet Tythes shall be paid.

Plow. Com.

470. Doct. and Stud. 196.

C. 11 part, *Lifords* case. acc.

It hath been a Question, whether Beeches are Timber-trees, and whether Tythes shall be paid of them; but the better opinion hath been, that they are not Timber-trees, and that Tythes shall be paid of them, except where by the custom of the Country, by reason of scarcity of Wood, they be accounted Timber-trees; for there no Tythes shall be paid of them: and so upon this difference it was adjudged, *Pasc. 16 Jacobi* in the Common-Pleas, in *Pinder* and *Spencers* Case. *Vid. Mich. 8 Jac. in Cancel.* The Countess of *Cumberland's* case. *Moor* 812. *M. 40 Eliz. B. R. Holiday* and *Lees* case adjudged. Tythes shall not be paid of Beeches above twenty years age, being Timber. *Moor* 541. *Tr. 14 Car. in B. R. Cro. 1 part. Gibbs* and *Wyborns* case. A man planted young trees in a Nursery in the Parish of B. and afterward he digged them up and sold them in another Parish. It was adjudged

judged that he should pay tythes of them in the Parish in which they were planted.

Hill. 43 Eliz. The Parson of *Ramsays* case. Tythe shall not be paid of trees cut for House-boot, Cart-boot, Plough-boot, nor of Asp.

If a great Wood doth consist for the most part of Underwoods which are tytheable, and some great trees or Beeches grow here and there *sparfim* therein, tythes shall be paid of the whole wood, unless they be especially excepted, as was adjudged *Tr. 19 Jac.* in the Kings Bench; and so if the Wood doth consist of the most part of Timber-trees, and there is some small parcel of Underwood or bushes growing in the same Wood, the priviledg of the great wood and Timber-trees shall priviledg the residue of the wood from tythe to be paid thereof, as it was said by *Warburton* Justice, it was adjudged 16 *Jacobi* in C.B. in *Leonards* case.

If Timber-trees have been usually topped and lopped, tythes shall not be paid of the tops and loppings; for the Law that priviledgeth the body of the tree, doth priviledge the branches of the same tree; so if a timber-tree become *arida*, *sicca*, *nec portans fructus*, *nec folia in aestate*, *nec existens Mareminum*, yet because sometimes it was an inheritance which was discharged of tythes, although that now it become a dotard, tythe shall not be paid of the same; for the quality remaineth,

24 *Eliz.* in B.
R. Foster &
Leonards case.
1 Cr p. 1.
Cook 11 part,
48. in *Lifords*
case.

Cook 11 part,
in *Bowles* case.

eth, although the state of the tree be changed.

Vid. Tr. 38 Eliz. Cro. 3 p. Ram and Patersons Case adjudged acc. *Tr. 2 Jac* in *B. R. Moor 762 Reynolds case*, acc. *Pasc. 29 Eliz.* in *B. R. Wray and Clenchets case. Moor 908.* Young Oaks under 20 years growth apt for Timber in time to come, shall not pay Tythes.

Tythes generally and originally are not payable of Houses for habitation, nor of any rent reserved upon any demise of them; for tythes are to be paid of things which grow, or renew every year by the act of God: and for the Houses in *London*, tythes antiently were not paid; for the profits of the Churches in *London*, consists onely in Oblations, Obventions, and Offerings: But now by a decree made in the year 1535. and confirmed by Act of Parliament made 37 H. 8. cap. 12. the Parsons in *London* have 2 s. 9 d. in every pound of Rent for the Tythe of the Houle; but if a *modus decimandi* be alledged to pay 12 d. in every pound of Rent for every House in such a Parish in *London*, this is a good *modus decimandi*; for it may be, that for the Lands upon which the Houses have been built, such a *modus decimandi* time out of minde hath accustomed to have been paid.

Tr. 8 Car. in B. R. the Earl of Desmonds case adjudged acc.

By the custome of the Realm, tythe shall be paid for Fish taken in the Sea; but the tenth Fish shall not be paid, but some

Cook 11 part, 16. D. Graunts Case.

Pasc. 34 Eliz. B. R. Green & Pipes Case.

Moor 912. acc.

some small some of money in consideration of a tythe: but if the Fish be taken in a pond, or in a several piscary, and not in the Sea, or any open River, then the owner shall pay tythe thereof, as a predial tythe was ought to be set forth within the Statute of 2 E. 6. *Mic. 15 Car. B.R. Cro. 1 part, Barfcot and Nortons case adjudged, That Tythes shall be paid of Honey.*

1 Cr. 339.
Hill. 9 Car.
15 Car. in
B.R. adjudged
acc.

To pay a Buck or a Doe, or the shoulder of a Deere when a Deere is killed, may be a good *modus decimandi* for the tythe of a Park, as it was adjudged, *Mic. 5 Jac. in Co. B. and Mic. 11 Jac. in Co. B. in Cooper and Andrews case. Vid. Moor 863.* This case is put, but not Resolved, the Court being divided in Opinions. *Vid. Tr. 38 Eliz. Moor 909. Beddingfields and Feaks case;* for a difference in this case. And although afterwards the Park be disparked, and the Land converted into tillage, or hop-grounds, yet the Parson shall not have tythes in kinde but the *modus* shall remain: so it is, if all the Park-pale falleth down, which is a disparking in Law of the Park, yet the same doth not destroy the *modus*, for that the same may be a Park again; but *Quere* of this case. For the difference hath been taken where the prescription goeth to so many acres of lands, and where to the Park by the name of a Park; for in the first case the *modus* continueth, but not

not in the last if it be disparked: see to that purpose, *Pasc. 19 Jacobi* in the Common Pleas, in *Poole* and *Reynolds* Case, where it was adjudged accordingly.

A prohibition was prayed upon a suit in the spiritual Court, for tythes in kinde of a Park now converted into tillage, upon surmise of a *modus decimandi* to pay a Buck or a Doe for all tythes, and the prohibition was granted; in which case these points were resolved. 1. That although that they are *fera natura*, yet they may be given for tythes. 2. Although they are not tytheable of themselves, yet they may be given for a *modus decimandi*. 3. That this is a discharge of the very suit, and the Park is not but a Liberty, and the owner may furnish it with game when he pleaseth: and so it was holden, *Hill. 6 Jac.* in Co. B. in the Vicar of *Clares* case: *Vide Sharp* and *Sharps* case, *Noy*, 148, acc.

13 Car. at the
Assizes at York,
Thursbys case.
V. Claytons
Reports 91.

In 13 Car. at the Assizes at York, *Thursbys* case was this, viz. Suit was for tythes of Corn growing in a Park which was then disparked; the defendant did plead a custome to pay Venison and a Horse-pasture time out of minde, in satisfaction of all tythes, &c. Evidence was given that Corn had been sowed there and reaped, but no tythes paid; but the witnesses proved a Buck paid yearly, but could not tell whether it

it was out of this Park or not, the Jury found; if it was paid out of any Park, if it was accepted and allowed, it was the better to uphold the custom, then if particularly tyed to pay a Deer out of this Park; for now, if the Park be disparked, yet this payment of the Deer may be performed; otherwise it had been, if the custom had been to pay a Deer out of this Park only; for then by the destroying of that, the custom had been gone also. In this case it was holden by the Judges, although the Deer had been often, and for the most part paid out of this Park, yet this doth not alter the custome, if it may be paid out of any Park: and if the custome was to pay a shoulder of Venison generally, it may come out of any Park; but the Judges directed the Jury, that if they found the Deer was to come out of this Park which is now disparked, then to finde a special verdict.

If a custom be alledged, that the Parson shall have but the tenth sheaf of Wheat for all the tythes of all manner of Corn and Grain, this is no good custome, as it was adjudged, 38 *Eliz.* in the Common Pleas: so in the case betwixt *Jacks* and *Sir Charles Candish*, *Mic. 11 Jac.* in *Co.B.* it was alledged that the owners of such a Farm had used time out of minde to take back thirty sheafs of the tythe-Corn after the same was set forth, to their own uses: it was the opinion of all the Justices,

*Tr. 38 Eliz.
Monday and
Louvics Case.
Moat 454.*

stices, that it ought to be alledged, that the Farm was a great Farm; for otherwise the custome would not be good, for that it tended to the impoverishing of the Parson or Vicar, in taking away of a good part of the profits.

Pasc. 30 Eliz. B. R. Stebbs and Goodlarks case, A custome of the Town of *Lowns* alledged, That the Parson shall have for his Tythe the tenth Land sowed with any manner of Grain; and he shall begin to reckon at the first Land which is next to the Church: The Parishioners left every tenth Land unsowed with Corn to defraud the Parson. Resolved: The custome was against Law and Reason, and a consultation awarded for the Parson to have Tythe in kinde. *Moor 913.*

19 Eliz. in B. R. Cooks Select cases, 58. In a prohibition upon a prescription *de modo decimandi* by payment of a certain sum of money at a day certain, the Jury found the *Modus decimandi*, but that it had been paid at another day. It was Resolved in that case, That no consultation should be granted; for although the day of payment be mistaken, yet it appeared to the Court, That no Tythes in kind were due, for which the same was in the spiritual Court, and the tryal of the custome *de modo decimandi* belongeth to the Common Law.

In debt upon the Statute of 2 E. 6. A prescription was made to pay one load of Hay

Hay for all Hay growing in such a Close ; this prescription was disliked of by the Judges, as where payment of one penny is pleaded in satisfaction of 20 *lib.* but upon the evidence, it was not proved that the load of Hay was paid constantly, but sometimes money, sometimes 5 *s.* sometimes 6 *s.* as the parties could agree ; the Jury found for the plaintiff against the prescription, and it seemed to the Judges, that the prescription should not be good to pay a load of Hay, because of the charge of the making of it, and also of the loading of it, if it was the usage so to do : *v. 13 Car. at the Assize of York, Jacksons case, Claytons Reports 60. case 103.*

But if a man soweth his Lands with Corn, and afterwards the heir maketh a composition with the Parson or Vicar to have but the thirteenth Sheaf for his tythe, this was holden to be a good composition, and should bind the Parson ; and if afterwards the heir doth endow his Mother of the third part of the Lands, the Mother shall have benefit of this composition, although that she cometh in paramount to the same.

In 17 *Car.* in the Kings Bench, *Hitchcock's Case* was this : A Vicar did Contract by these words, *viz. (inter se conveniant)* with a Parishioner to pay so much for increase of Tythes, and died : His Successor sued in the Ecclesiastical Court for

Pasc. 17 Car. in B.R. Hitchcock's case. March's Reports 87.

for them: and in this case a prohibition was granted; for it was said, this was not a real composition, although the Bishop called it so, but a personal agreement only; and in this Case it was said, that if it was a real Contract, and made between Spiritual persons, and only concerning Spiritual things, it was suteable only at the Common Law, and should not bind the Successor. *Note, Hill. 31 Eliz. B. R. Gomersal and Bishops case, Leon. 1 part, 128.* An Agreement betwixt the Parson and his Parishioners is a good cause to grant a prohibition, if the Parson libelleth in the Spiritual Court against such Agreement.

Tr. 31 Eliz. B. R. Chapman and Hursts case, Leon. 1 part, 151 acc. Mich. 4 Jac. B. R. Hawks and Brothwicks case. A Parson grants his Parishioners Tythes by way of Reteinor for three years; by parol it is good; but otherwise it is, where it is as long as the parties shall live. *Telverton, 94. 95. Vid. Tanner and Smales case. ibid. acc. Cro. 2 part, Ab. 417. acc.*

Pasc. 21 Jac. in B. R. Snell & Beatts Case.

A Parson did Covenant with *A.* his Executors and Assigns, that for ten shillings to him paid every year by *A.* his Executors or Assigns, that he, his Executors and Assigns should be quit of the Tythes for such Lands during the life of the Parson. *A.* paid the Parson 10 s. which he accepted of. Afterwards *A.* made *B.* an Infant his Executor, and died. Ad-
ministra-

ministration *durante minore etate* of the Infant was committed to another, who leased the Lands at Will: the Parson libelled in the Spiritual Court against the Tenant at will for to have Tythe in kind of the Lands; it was adjudged in this case, that he should have a prohibition, for that the Agreement and Composition did bind the Parson during his life; and although the Assignee could not sue the Parson upon the Contract, yet he should have a prohibition to stay his Suit in the Ecclesiastical Court, and put the Parson for his remedy for the 10 s. upon the Contract; for he could not have Tythes in kind, because of the Composition. *Hill. 32 Eliz. B. R. Woodward and Baggs case, Leon. 3 par. 257.* In consideration of 5 l. paid by A. Parson to the Parson, It was agreed, That A. and his Assigns should be discharged of Tythes of the Land during his life. The Parson sues the Assignee of A. for tythes in kind, who prayed a prohibition, which was denied, because it was an estate for life, and could not pass but by Deed. But if it had been a Covenant for years, it had been good. *V. Westbed and Peppers case. Resolved acc.*

Every *Modus Decimandi* is by Prescription, and is intended to have a lawful Commencement upon some agreement at the first made for valuable consideration with the Parson or Vicar; and therefore although that Tythes in kind hath
S been

12. Pas. 16 Jac. in B.R. Fulder and Griffins Case, acc.

Mic. 6 Jac. in Co. B. Mildmans and Hugtons Case, adjudged, acc.

Mic 44 *Eliz.*
B.R. Nowel &
Hicks case.
Co. 2 part,
Instit. 653,
1 Instit 114.b.
15 E.3. Judge-
ment 133 &
155.
V. De Jure Di-
vino, de
Dismes.

8 *H.6. 22,23.*
 9 *H.6. 17.*
 41 *E.3. 27.*
 17 *E.3. 11.*
 12 *H.4 13.*
 19 *H.6 75.*
 34 *H.6 36.*
 31 *H.6. 28.*
 35 *H.6. 5.*
 26 *H.8. 7.*
 27 *H.8. 20 &*
 21. acc.

been paid for twenty or thirty Years together. yet the same shall not destroy the *Modus*: And *vid. 44 Eliz.* in *B. R.* in *Nowels* and *Hicks* case: *Cook 2 part*, *Instit. 653.* When a Custom doth create an Inheritance, it cannot be waved or annulled by payment, or other matter in *Pais*, *Vid. acc. 15. E. 3. title Judgment 133. 14 E.3. ib. 155.* And it was agreed in *Doctor* and *Student*, that if it were ordained by Law, that payment of Tythes in kind should cease, and that every Curate should have assigned unto him such a portion of Land, Rent, or Annuity, as should be sufficient for him; Or that every Parishioner should give a certain sum of money for the maintenance of the Curate; that such a Law would be a good Law: And then if Tythes may be so changed by a positive Law into Rent, or Annuity, there is no Question to be made, but a composition made with the Parson or Vicar to pay a *Modus Decimandi* which hath continued time out of mind, Custom being equivalent to Law, is good and shall binde the Parson and his Successors: But a *Modus Decimandi* cannot begin at this day, but must be by prescription: But yet at this day, a composition may be made, which shall binde during the life of him that made it, as it was agreed, *Pasc. 17 Car. in Hickcocks case* above-mentioned, *Vid. Pasc. 5 Jac. B. R. Telverton, 93.* Composition by

by a Parishioner with the Parson, that he shall retain his Tythes for seven years, paying 50 *lib. per an.* is good, by word without deed, otherwise to hold them for life. Vid. *Hawke and Brothwits* case, *ibid.* adjudg. acc.

In an Action of Trespass a prescription was layed, that 2 s. 9. d. had been paid for eleven Doles of Meadow; the Case was, That these eleven Doles were parcel taken out of a great Meadow; and the Witnesses did prove that a third-part had been paid for every Dole of the whole Meadow, of which the eleven Doles were parcel. In this case, it was adjudged against the the Plaintiff, because he laid his prescription entire, and several thirds for every Dole, though it did amount to so much; and thereupon the Plaintiff was Nonsuit.

13 Car. in B.
R. *Setons* case.

In a Prohibition a prescription was suggested to pay a rate-Tythe of 13 s. 4 d. for all Land, &c. and for the profits of a Mill; upon Evidence, the Witnesses proved several small sums paid, as 5 s. 2 s. &c. which in the whole came to the just sum in the prescription; this was holden to be no good proof of the prescription by the Owner of the Inheritance; But otherwise it had been, if these several sums had been paid by the several Tenants of several parcels of the Lands in Question; and in this case, If such a prescription is laid for an hundred

15 Car. Sir
Arthur Robinson
case. *Claytons* Reports,
f. 31. case 135.

S 2 Acres,

Acres, and the plaintiff faileth in the number; *Quere*, if it be not a failer of the prescription: therefore it was conceived the best way to lay it was, that it had been paid for such Closes, &c. by name; and it was clearly holden in this case, that there being no proof made which did extend to the Mill, that the plaintiff did fail in his prescription in all.

Note, There is a difference betwixt a suggestion to have a prohibition and a prescription contained in it, and a prescription made in defence, or by way of plea; for in the said case a joynt prescription is made of two things; if he fail in one, all is destroyed, because it is by way of Title. But where it is only to give the Court jurisdiction, there it is otherwise; and therefore if a suggestion to have a prohibition be, That he hath paid for the Tythes of Wool and Lamb 2 *d.* and upon the proof it appears that the 2 *d.* hath been paid for the Lambs, and not for the Wool, although for the Wool the Suit doth remain to the Spiritual Court; yet for the Lamb, which is a *Modus Decimandi*, the prohibition stands good. Mich. 2 Jac. in B. R. The Case of prohibition. *Yelv.* 55.

The proper Court, for the Parson or Vicar to sue in for his tythes not paid, or withholden from him by his Parishioners, or for the profits of his Church taken from him by another Parson or Vicar, is the

the Ecclesiastical Court, by a Libel there preferred against them, or by a Spoliation.

If one Parson taketh away the tythes or profits belonging to the Church of another Parson: If the tythes or profits do amount to a fourth part of the value of the Church, he shall have Spoliation against him in the Spiritual Court, although they claim by several Patrons: and if they claim both by one Patron, there one shall have Spoliation against the other, although the profits do amount to above a fourth part, as to a third part, or the moyety of the Church, because in that Case the Patronage doth not come in debate: But if the profits do amount to above a fourth part, and they claim by several Patrons, there if one Parson sueth a Spoliation against the other in the Spiritual Court, the party grieved (which is the Patron) shall have an *Indicavit* (which is in the Nature of a prohibition) unto the Spiritual Court, because the right of the Patronage doth come in debate. But where the Right of the tythes doth onely come in debate, and not the right of the Patronage, there the Spiritual Court shall have the Jurisdiction of it: & therefore in an action of trespass brought by a Parson against a Vicar for Underwood, & each of them did claim the Underwoods by prescription as his tythes, there although their claim was by prescription (which was a matter triable at the Common Law) Yet

38 H. 6. 20.
by Fortescue.

36 H. 2. 3.

22 E. 4. 24.
Mic. 29 Eliz.
in B. R. adjudged acc.
35 H. 6. 39.
acc.

because the Right of the Tythes was in debate onely, the temporal Court was ousted of the Jurisdiction.

Mic. 10 Jac.
in Co. B. *Spratt*
and *Nicholson's*
Case.

Spratt Subdean of *Exeter* did Libel in the Spiritual Court against *Nicholson* Parson of *A. pro annuali pensione* of 30l. out of his Parsonage, and shewed in his Libel, how that *tam per realem compositionem, quam per antiquam & laudabilem consuetudinem*, ipse & *Predecessores sui habuerunt & habere consueverunt predictam annualem pensionem* out of his Parsonage of *A.* and in this Case it was adjudged, that although he claimed the same pension by Temporal grounds, viz. by Prescription and real Composition;

Tr. 41 Eli. B.R.
Collies Case.
Cro. 3 p. 675.
Hill. 6 Jac.
B. R. Bulbrook
and *Briggs*
Case. *Cro. 2 p.*
acc.

yet because the parties were both Spiritual persons, he had his Election to sue for the same either in the Spiritual Court, or in the Temporal Court. And the Statute of 34 *H. 8. cap. 16.* gives liberty to Spiritual persons to sue for pensions in the Spiritual Court: but if a Spiritual person who hath such a pension by prescription, bringeth a Writ of Annuity for the same (as he may do if he will) and declares upon the prescription, he cannot afterwards sue for this Annuity in the Spiritual Court, by the name of a pension, for that he hath determined his Election; and if he doth, a prohibition will lie.

Vid. 32 E. 3. Jurisdiction 26. A Vicar had Tythes and Oblations, and an Abbot claimed a pension of him by prescription: the

the prescription adjudged was tryable at the Common Law, although that Suit was betwixt spiritual persons.

Vid. 20 H. 6. 17. 19 E. 3. *Fitz.* tit. Jurisdiction 28. The Bishop of *Winchester* case; where a *Modus Decimandi* is in Question, although the Suit be betwixt spiritual persons, it shall be tried by the Common Law, and not in the spiritual Court. *Vid.* *Cook* Select Cases, in the Case *De modo Decimandi* 40.

See 35 Eliz. in *Croker* and *Dorners* case, in *Pophams* Reports 23. where it was holden by all the Justices, that a pencion issuing out of a Rectory, is the same with a Rent: and that such a pencion was demandable by the Common Law, in the Common Law-Court; and by that Case it appeareth, that such a pencion was demanded in a Writ of Entry, whereupon a Common Recovery was had.

And so if a Parishioner shall refuse to pay his tythes, or doth not set forth his prædial tythes, the Parson may Libel against him in the Spiritual Court if he please; Or else at this day, the Parson or other Proprietor of the tythes, may have their Action in the Kings Temporal Courts, for the not setting forth, or for the subtraction of them, at their Election, and shall recover the treble value of the tythes, as it was adjudged by all the Judges of *England*, against the opinion

of England, against the opinion of *Egerton* Lord-keeper, 29 *Eliz.* in *Woods* case. For although that the treble value be not given to the Parson or proprietor of the tythes by any express words in the Statute of 2 E. 6. *Hill.* 2 Jac. B. R. *Cro.* 2 part, Ab. 393. *Dagge* and *Penkevons* Case acc. *Vid. Moor* Ab. 277. acc. Yet forasmuch as he is the party grieved; and hath the right of the Tythes in him, the treble value is given to him. For whensoever a Statute giveth a forfeiture or a penalty against any one who wrongfully deteinteth, or dispossesseth another of his Right or Interest; in that Case, he who hath the wrong, shall have the forfeiture or penalty, and shall have his Action at the Common Law for the same, or else he may sue in the Ecclesiastical Court for the same case.

V. Cook 2 par.
Instit. 650. b.
Hill. 40 *Eliz.*
in Co. B. Rot.
699. *Bedells*
Case acc.
Which *V. Cook*
Select Cases,
47.

Tr. 44 *Eliz.* B. R. *Moor* 915. *Day* and *Peckvells* Case, Resolved, That in an Action brought at Common Law upon the Statute, the Jury cannot give less then treble Damages, but no Costs. 2. That a Farmer shall have Action upon the Statute, by the equity of the Statute, although he be not within the words of the Statute. *Cro.* 2 par. acc.

In 17 *Car.* in the Common Pleas, the Case was this; A. Parson Libelled in the Ecclesiastical Court for Tythes, and set forth that the Tythes were set forth, and

that

that the defendant did hinder and stop him to carry them away. It was holden by the Justices in that case, that because he did not sue upon the Statute, for he doth not mention the double value in his Libel as he ought to do, as was agreed by all the Justices, a prohibition in that case was awarded.

Now, what shall be said a setting forth of the Tythes, and what not, appeareth by the Judgment given 10 *Car.* in *Andersons* case: where it was holden by all the Justices, that if a Parishioner setteth forth his Tythes, and they stand upon the Land two or three days, and afterwards he taketh and carrieth them away, that this is not a setting forth of the Tythes within the Statute of 2 *E. 6. Pasch.* 40 *Eliz. B. R. Leigh and Woods* case, *Cro.* 3 part, 601 adjudged acc.

If Tythes be set forth, if they be carried away by the Tenant of the Land, or by a stranger, the Parson may have Trespass; but then he must set forth his Title as Parson; and he shall have convenient time for carrying them away, of which convenient time the Law shall judge. But if the Parson suffer them to continue long upon the Land, the Tenant of the Land may distrain the Corn damage feasant, or have his action upon the Case against the Parson. *Hill.* 22 *Jac. B. R. Mountford and Sidleys* case, *Bolstr.* 3 part, 336.

Tr.

Tr. 30 Eliz. B. R. *Leon.* 2 part, 101. If a Parishioner setteth out his Tythes, and the Parson will not take them, but they are destroyed by Cattle, he shall not pay Tythe again: But if he setteth them out, and presently takes them away, he shall pay Tythes again. *Bennets and Shortwrights Case.* Vide Tr. 44 Eliz. B. R. *Sprat and Heals case.* *Cooks Select Cases,* 23.

Pal. 15 Car. in the Kings Bench, In an action brought upon the Statute of 2 E. 6. and found for the plaintiff, it was moved in arrest of Judgment, because the plaintiff said, that the defendant was Occupier only, and did not shew what interest he had; But it was the Opinion of the Justices and the whole Court, that he needs not so to do; for that whosoever taketh away the Tythes is a Trespasser: and an Action lieth against a Disseisor for the Tythes: and that if one cutteth them, and another carrieth them away, an Action lieth against any of them. Mich. 8 Jac. Sir *John Gerrants case.* Two Tenants in common, one setteth out the Tythes, and the other carries them away: Action lieth against him only that carrieth them away. Vid. Mich. 8 Jac. C. B. *Cole and Wilkes case.* *Hutton* 121. acc.

Note, where the suit in the Ecclesiastical Court doth not belong to them, but to the Common Law, there a *Præmunire* lieth: As if the Parson after sending of the Tythes,

Tythes, will sue here for carrying away of the Tythes severed; both the Actor and Judge incur the danger of a *Præmunire*. 17 H. 8. *Spilman's Reports*. *Turburviles* case. Vid. *Cook*, 12 part, 39, 40, accord.

If a Parson or other Proprietor of the Tythes will sue for the same in the Ecclesiastical Court, for not setting forth, or the subtraction of them after they are set forth, he shall recover in that Court but the double value of the same; and the reason thereof is, because in the Ecclesiastical Court, he shall recover the Tythes themselves; which makes it equivalent with the treble value at the Common Law, as it is said in *Cook* 2 part, In *tit.* 631.

And therefore the case was, *Hil.* 11 *Jac.* in the Court of Common Pleas, that a Parson did libel in the Spiritual Court for the subtraction of Tythes, and the defendant in the Court of Common Pleas suggested to be discharged of Tythes by privilege within the Statute of 31 H. 8. and had a prohibition: and Issue being joyned in the Court of Common Pleas upon the privilege, the plaintiff in the prohibition was Non-suit. Whereupon a Consultation was awarded, and a sentence was afterwards given for the Parson in the Spiritual Court, that he should recover the single value, and for the value certain; *Et ulterius quod recuperet duplicem valor-*

rem,

Hil. 11 *Jac.* in Co B. *Baldwin* and *Gerryes* case.

Vid. *Mich.*

11 *Jac.* in Co. B. The Dean and Chapter of *Windsor* and *Webbs* case, adjudg. acc. *Godb.* 211.

rem, and set the same also certain. And after this sentence a prohibition was awarded, because therein they exceeded the value which was to be recovered in their Court; and it was adjudged, that although their sentence was not, that he should recover the treble value; yet because Sentence did amount to so much being laid together, a special prohibition was awarded, setting forth the whole matter at large. Note, 30 *Eli. Leon.* 3 part, 204. Resolved, A Bill doth not lye in the Exchequer-Chamber, to have the treble value for not setting forth of tythes, according to the Statute of 2 *E. 6.* because the plaintiff hath his remedy for the same in the Court of Pleas in the Exchequer.

And a Parson shall have an Action upon the Statute of 2 *E. 6.* for the treble Value, or may sue in the Spiritual Court for the double value at his Election, although he be no Parson at the time of the action brought: For if a Parishioner doth not set forth his Tythes, or substracteth them after they are set forth, and afterwards the Parson is deprived for Symony, or other crime, and so declared by a sentence given in the Spiritual Court against him; yet may such a Parson after such his Deprivation sue in the Ecclesiastical Court for the substruction of the Tythes which were due to him before his Deprivation, and a prohibition will not lie, as it was ad-

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adjudged, Hill. 13 Jac. in *Coles Case*. Mich. 40 Eliz. B. R. *Johns and Carnes case*, Cro. 3 part, 621. If Debt be brought upon the Statute for not setting forth of Tythes, adjudged, Not guilty is a good plea, because the Action is founded upon a wrong done. Vid. Trin. 42 Eliz. Cro. 1 part, *Worsley and Harpinghams case* adjudged acc.

And thus much briefly for Tythes, the profits of the Church or Parsonage belonging to the Incumbent : let us now come to speak somewhat of Churches Collegial and Parochial, either Presentative, or Donative ; And how, where, and by whom an Union may be made of two Churches into one, and of the Appropriations of them, and of Advowsons.

CAP.

CAP. XXVIII.

Of Churches Cathedral, Collegial, and Parochial, Presentative, or Donative; Of Visitation of them: Of Proxies incident to Visitations, and of the Union of Churches, and of the Appropriations of them, and Advowsons.

ALL Churches are Cathedral, Collegial and Conventual; or Parochial: A Cathedral Church is the See, or Church of the Bishop of the Diocese, whereof he is the Incumbent. Vid. in *Andersons* 2 part, 168. There cannot be a Cathedral Church without a Bishop; for it is *Sedes Episcopi*, and therefore without the Bishop it cannot be conveyed to another.

Doda. 5. acc.

Cook 11 p. 71.

37 *Ass.* 29.

40 *E. 3.* 28.

Of every Cathedral Church there is a Dean, and a Chapter, who are the Prebendaries or Canons thereof, who are of Council with the Bishop: But they have and hold their possessions severed and divided from the possessions of the Bishop. The Visitation of Cathedral Churches doth belong unto the Metropolitan of the Province, or else to the King, when the Temporalities of the Archbishop of the Province,

vince, *sede vacante*, are in the Kings hands.

Collegial Churches or Conventual, were such as in times past, were belonging to Abbies or Priories, and the like, and such as are at this day in Colledges.

A Parochial Church is that *Ad quam Ecclesiam Plebs convenit, ad percipienda Sacramenta Baptismatis & Corporis & Sanguinis Christi, unde pabulum ad animas sustentandas suscipiant*: of which the Parson, or whom we have before spoken at large, is Incumbent, who hath the Cure of all the Souls within the Parish.

In a Church Parochial there are other Officers besides the Parson and Vicar, viz. the Church-wardens, Parish-Clark, &c. The Church-wardens are a Corporation, who have a capacity to take goods into the use of the Church; and the Government of the body of the Church doth appertain unto them: they shall have an Action of Trespass for taking away the Goods and Ornaments of the Church in their own Names: and also shall have an Appeal of Robbery for the goods of the Church, which are stolen out of the Church: and if they do recover damages in any Action brought by them as Church-wardens, the damages shall go to the use of the Church, and they shall not have them to their own uses. But the Church-wardens have not a capacity to pur-

Co. 1 part, Instit. 3. a.
13 H. 7. 10. a.
Note, Hil.
7 Jac. B.R.
Starkey and Gores case.
Yelv. 173.
37 H. 6. 30.
3 E. 2. Itin.
Kanc.
Lib. Abrid.
Ass. 76.
8 E. 4. 6.
13 H. 7. 10.
acc.
Cook 1 part, Instit. 3.
12 H. 7. 29.

purchase Lands to the use of the Church : Nor is any Lease made by them of the Churches Lands good in Law. *Vid. Mic. 31 Eliz. in Com. Ban. in Hadman and Ringwoods case. Cro. 3 part, 145, 129.* They must declare, that the taking was not *ad damnum ipsorum*, but *ad damnum Parochianorum*.

The disposing and placing of the Parishioners in Seats in the Body of the Church, doth appertain to the Ordinary *de communi jure* ; and by appointment from and under the Ordinary, to the Church-wardens : and for a Seat in the Church, the Suit doth properly belong unto the Spiritual Court : But if a Custom be alledged, that the Church-wardens themselves in their own Rights, time out of mind, without the power of the Ordinary, have used to have the placing of the Parishioners in Seats *Navis Ecclesie*, this is a good custom, and for such a Seat the Suit shall be at the Common Law, and not in the Ecclesiastical Court, because the Ecclesiastical Court cannot try the custome, as it was adjudged 9 *Car. in the Kings Bench, in Tompsons case.*

*Mic. 10 Jac.
in C. B. Pym
and Garvins
case.*

If a Gentleman with the consent of the Ordinary, hath built an Isle to the Church, and set convenient Seats there for him and his Family, and hath always repaired the same at his own costs and charges ; if the Ordinary place another man in the Seat with him, without his
con-

consent, he may have his Action upon the Case against the Ordinary; But if with the content of the Ordinary a man builds or sets a seat in *Navi Ecclesie*, and another man pulls down the same, or defaceth it, an Action *Vi & Armis* will not lie against him, because the Freehold of the Church is in the Parson; but in such Case, he may sue the party in the Spiritual Court for the wrong done unto him.

Cook 12 par. 105. *Pasc.* 10 *Jac.* *Hussey* and *Leytons* Case in the Star-chamber adjudged, acc. *Vid. Tr.* 18 *Jac.* *C. B.* *Dawtrie* and *Dees* case: *Bridgman* 4. acc. The Heir shall maintain Trespas for breaking the Coat-armour of his Ancestors set in the Church, *12 Jac. B. R.* *Francis* and *Leggs* case, *Cro.* 2 par. adjudged.

Vid. Tr. 18 *Jac.* *B. R.* *Rott.* 1193. *Dawtree* and *Dees* case, *Bridgman* 4. Resolved, That one cannot have a Freehold in the Church, nor any part thereof, but the Freehold is in the Parson.

The Church-wardens are at every Visitation of the Bilhop of the Diocess to make presentment of all Misdemeanours and Offences in the Parson, Vicar, or Parishioners, either concerning Religion, or the breach of the Rites and Orders of the Church, and for to present the defaults of all that repair not to Divine Service there, or observe not the Rites and Ce-

T remonies

26 H. 8. c. b.

remonies of the Church : and although they have so large an Authority in the Parish under the Ordinary ; yet they are not esteemed to be Ecclesiastical persons, but they are for the most part Lay-men, and they may be removed from their Offices by the Ordinary, upon just cause of complaint made unto him, or else by the Parishioners themselves ; and therefore if a Parish doth prescribe to have the choice of their Church-wardens for two years together with the assent of the Parishioners, yet may the Parishioners themselves within two years remove such Church-wardens, and appoint others in their places ; otherwise they might waste all the goods of the Church within the two years, for which the Parishioners could have no Remedy against them.

The Parish-Clark is an Officer in the Church ; but he is most commonly a Lay-man, and no Ecclesiastical person ; and his Office is but a Lay-Office : He is to be chosen by the Parishioners, and not by the Parson or Vicar alone ; and he is also removeable upon cause from his Office at their Wills and Pleasures : He is not a person corporate, nor hath succession ; and the Parson is not tied to find the Parish-Clark, as it was adjudged, *Hill* 30 *Eliz.* in B. R. in *Saul* and *Woods* case ; But if the Parson be tied to find such a Clark, A prescription to pay 5s. per an. or such sum to such a Parish Clark

Hill. 30 *Eliz.*
B.R. *Saul* and
Woods Case.

16 en. 1 p. 94.

Clark by a Parishioner in discharge of his Tythes, is a good discharge of the Tythes against the Parson: But yet Tythes are not payable to him as Tythes. 18 E. 3. 27. A Gift in tail was made of the Serjanty or Clarkship of the Church of *Lincoln*; It was adjudged, That the Office was Temporal, and should not be tried in the Spiritual Court, but in the Temporal Court. And that he is but a Lay-person, and removeable as aforesaid, appeareth by the Book of 3 E. 3. Annuity 40. where an Annuity was granted unto a man until he was promoted unto a Benefice; and in a Writ of Annuity brought by the Grantee, the Defendant did alledge that the Plaintiff was made by him the Clark of such a Parish-Chnrch; and it was ruled to be no good plea, to bar him of his Annuity: for that the Clark of a Parish was but a Lay-officer, and he was removeable at the pleasures of the parishioners; and the Clarkship was no Benefice within the intent of the Grant. So likewise was it adjudged in the case of a prohibition; where the parishioners of the Parish of St. *Alphage* in *Canterbury* did prescribe to have the Election of their Parish-Clark, and by a Canon made 1 *Jacob.* the Election of the Clark was given to the Vicar: it was adjudged in this case for the reasons before alledged, that the prescription should be preferred before the Canon,

*Pasc. 8 Jac. in
Co.B. Cundill
and Plomers
Case.*

and so much the rather, because by the prescription no more was claimed, then by the Law of the Realm was due and usual; and a prohibition was awarded accordingly. *Vid.* Mich. 16 Car. in B. R. Orme and Pembertons case. Cro. 5 par. ace. Tr. 15 Car. B. R. Cro. 3 par. Evelins case, acc. Pasch. 21 Jac. Cro. 2 par. Jermyns case adjudged, acc. Pasch. 17 Jac. B. R. Cro. 2 par. Warrens case, acc.

Churches Collegial, Conventual or Parochial, were always Visitable by the Bishop of the Diocess, if no special Exemption was made by the Founders of the Ordinaries Jurisdiction in the Visitation thereof: And so were all Abbies, Priories, and other Religious Houses; and the Bishops, or other Visitors had anciently Proxies allowed them for their Visitations, which was a certain Exhibition of provisions in *Esulentis & Pauculentis* in the time of their Visitations. *Vid.* p. Dodd in Colt and Glovers case. Moor 899. If several Benefices be granted to a Bishop within his Diocess, to hold them in *Commendam*, he shall be visited by the Metropolitan.

A Proxy is called *Procuratio*, and ought to be *secundum qualitatem personæ Visitantis, & substantiam Visitorum*. But when the pomp of the Visitors did require such provisions as were intolerable both to Incumbents of Churches, and to Religious Houses whereof they were the

the Visitors, every Church and Religious House was reasonably taxed ; and the Proxies for provisions were reduced into certain sums of monies, which were paid yearly into the Nature of pensions to the Ordinaries who had the power to visit them.

Upon the Dissolution of Abbies and Monasteries, Proxies were not extinguished, although the Visitation did cease : neither were they extinguished by Unity of possession in the hands of the King, but suspended only : And when the Abbies and Pories, and the Land out of which the Proxies were paid by Grants from the King, came unto Lay-men, then were those Proxies revived, and at this day they are due and payable out of all Improvements unto the Ordinaries, although the Visitation doth cease : And all other Churches presentative do at this day pay a certain sum of money to the Ordinary for a Proxy for his Visitation.

Proxies do agree with Tythes in some things ; for as the Instruction of the people in the Service of God, was the first cause of payment of Tythes : so Visitation ; which (as Mr. Littleton saith) doth always accompany Instruction, was the first cause of Proxies ; and as no Lay-man can prescribe in *Non Decimando*, as before is said ; so according to the Rule of the Canon-Law, *Nulla est ad-*

versus Procuracionem Prescriptio.

But if a Parochial-Church be Donative (as the same may be) and exempt from all Ordinaries Jurisdiction, there the Ordinary shall not visit the Church, but the Patron by Commissioners appointed by him; and there it seems Proxies shall not be paid; for that Proxies are Spiritual duties, which had their original by the Canon-Law, and were due only to Ordinaries and Ecclesiastical Visitors, and were recoverable only in the Ecclesiastical Court, and were not due or payable to Lay-Patrons, or such their Visitors.

20 E. 3. Ex-commeng. 9.

21 E. 3. 60.

V. Cook 12 p.

41, 42. in Nicolas Fudlers

Case. acc.

6 H. 7. 4. by

Keble.

8 Aff. 29.

F.N.B. 42. acc.

If the King doth found a Church or Chappel, he may exempt the same from the Ordinaries Jurisdiction: and then the Lord Chancellor of *England*, or the Lord Keeper of the Great Seal for the time being, shall visit the same: And if the King by his Letters Patents do License a common person to found a Church or Chappel, exempt from Ordinaries Jurisdiction, the same shall be Visited by the Founder, and not by the Ordinary: And if such a Clark Donative be disturbed in his Incumbencie, the Patron or Founder shall have a *Quare Impedit presentare ad Ecclesiam*, and declare upon the special matter: But if the Patron of a Church Donative doth once present unto the Ordinary, and his Clark be Admitted and Instituted, it is now be-

come

cook 1 part,
Instit. 344.

come presentable, and it shall never be Donative after, and then the Ordinary shall visit the same, and a Proxy shall be paid, and Lapse shall incur to the Ordinary, as it shall do in all other Benefices presentable.

By the Common Law, if two Churches be so poor, and of so small Revenue that the Incumbents cannot live, and maintain their charge out of the profits of them, the Ordinaries, Patrons and Incumbents may make a consolidation or an Union of the two Churches into one, and then upon the Union, it must be appointed who shall present next after the Union, one of them, or both of them, or Joyntly, or severally by Turns: and upon such Union and agreement made by Instruments or Writings under the hands and Seals of the Patrons, Ordinaries and Incumbents, each of the Patrons, if he be disturbed, may have a *Quare Impedit Presentare ad Ecclesiam*: and although by the Union, the Incumbency of the one Church be lost and extinguished, yet the Patronage doth remain still in being: and therefore if an Annuity be granted out of the Church of D. and afterwards the Church of D. is united to the Church of S. if the Grantee doth release to the Patron of the Church of S. the Annuity is not thereby extinct: But a Release to the Patron of the Church of D. will extinguish the Annuity.

V. Pasc. 3 Jac.
in B.R. Cro. 2
part. Fairchild
and Gayces
case. 63. ac.
22 H. 6. 25.

30 E. 3. 27.
46 E. 3. 28. a.
31 H. 6. 7. b.
acc.

Dr. & Stud.
116.

Every Union must be made by the Ordinaries, with the consent of the Patrons, by special words of *Unire, Annectere, Consolidare*, or the like, and must be perpetual: For an Union of a Church for life or years is not good.

33 E. 3. ^{Qu.}
Imp. 197.

12 H. 8. 8. by
Eliot.

17 Mic. 29 Eli.
in Excheq.
The Queen
and Vaux's
Case. Leon.
1 p. 48. acc.
6 H. 7. 1 A.
Plow. Com.
497. b. acc.

It hath been some Question, whether at the Common Law, an Union might be made of one Church or Chappel to another Church or Chappel, without the Kings Licence or consent: And I do conceive that it might be; For the Union is the Act of the Ordinary: *Unio est actus Spiritualis*, and as one saith, *Munus Episcopale est Unire, quia tota Diocesis est Cura Episcopi*; and the Licence of the King is not so necessary in the case of Union of one Church unto another, as the same is in the Appropriation of Churches, or Advowsons; and I find in our Books, that in cases of Union, the Licence of the King is not pleaded, but it is said only, that the Union was made by the Patrons and Ordinaries, or *concurrentibus his qui in lege requiruntur*: In 11 H. 7. 9. the Chappel of *Wanborow* was united unto *Magdalen-Colledge* in *Oxford*, and it was pleaded, that the Union was by the Patron and Ordinary, but it is not pleaded to be with the Licence of the King: And so in 9 Eliz. Dyer 219. The Parish-Churches of *Illesfield* and *St. Martins* in the County of *Southampton* were united by the Ordinaries, with the consent of the

the Patrons, but it doth not appear that there was any Licence of the King.

It is certain, that no person can Found any Church, Chappel, or Colledge without the Kings Licence, as appeareth by the case of 7 E. 6. *Dyer* 18. where Pope *Urban* at the request of the Baron of *Greystock* Founded a Colledge of a Master and six Priests, which was certified in the Book of the First-fruits, by the name of *Rectorium & Collegium de Greystock*; yet because it was agreed, that the Pope could not found or incorporate a Colledge within this Realm, nor assign, nor Licence any to assign Lands to the same, but the same must be done by the King himself; it was adjudged that the Foundation was void; and although the Colledge had the countenance of a lawful Colledge and Foundation, yet it was no Colledge within the Statute of 1 E. 6. of Chauntreys.

But if one Church or Chappel be united unto another without the Kings Licence, yet the union is not void (as I conceive) for these causes: 1. The Parson, Patron and Ordinary at the Common Law might have aliened the possessions of the Church, or have charged the same without the Kings Licence; *a fortiori*, they might unite two Churches in one; for that the King lost nothing thereby. 2. If an Advowson holden of a common person, be appropriated without the

21 E. 3. 5. by
Shard.

Kings

Kings Licence, it is no forfeiture of the Advowson, but the King shall present upon the avoidance *Nomine districtionis tantum*, until a Fine be paid unto the King for the Alienation in *Mortmain* without Licence; but it doth not make void the Appropriation. If then in that case, the Appropriation be not avoided, *a fortiori*, an Union shall not be avoided, which is less than an Appropriation, although it be without the Kings Licence. 3. The right of the King to present to the Church is only for Lapse, which is but a casual and collateral Right: and therefore an Union made without the King of two Churches into one, by the Common Law may be good, and stand good.

By the Statute of 37 H. 8. c. 21. it is enacted, That whereas there are many poor Parishes within one mile of another, the Tythes and Revenews whereof are not sufficient to maintain the Curate, and for the maintenance of the Reparations, Ornaments and Duties belonging to the Church, that an union or consolidation of two such Churches may be into one, with the consent of the Ordinaries, Lawful Patrons and Incumbents by Writings under their hands and seals: In that Statute there is no mention made of the Licence of the King to be had, or that the union must be with his consent; which if the consent of the King had been necessary,

fary, I conceive the makers of that Law would not have omitted : and the King doth not lose any thing by such union ; For that all Tenths, and First-fruits of Churches or Chappels united according to that Statute, are thereby saved and reserved to the Crown.

Trinit. 9 Car. in the Common-Pleas, in the case between *Dr. Rowlins* and *Sir Henry Taxley* for the Church of *Bowthorpe* in the County of *Norfolk* ; the Question was, Whether the said Statute of *37 H. 8.* did extend to a Church Parochial only, or to other Churches ; and whether by that Statute a Parochial Church might be united to a Church Collegiate without the Kings Licence. I did not hear that the Question was ever resolved, or that any Judgment was given in that case : and therefore I will not take upon me to determine it. But in all cases of union of Churches, I conceive it to be the safest and surest course, to have and obtain the Kings Licence or consent, although that it be after such union made ; for that perhaps will be sufficient : For so it was holden to be in the case of *11 H. 7. 9.* For there, after the union made, the King granted his pardon, which was holden to be a subsequent assent, and sufficient to make the union good : and so it was adjudged, *Tr. 37 Eliz.* in *Com. Banco*, in *Austin* and *Twines* case, that the confirmation by the Kings Letters Patents, of an union made
of

of the Parish-Church of *Ashe* unto the Deanery of N. after the union made, was sufficient. *Vid.* this case, Trin. 37 *Eliz.* Rot. 348. in *Moore's Reports* 661. The Union within this Statute must be, where the Churches are under the value of 8 *l. per an.* in the Kings Books of First-fruits.

Now although that one Church or Chappel may be united unto another Church or Chappel, both by the Common Law, and by the Statute of 37 *H. 8.* by the Patrons, Ordinaries and Incumbents, without the Licence precedent of the King, or his subsequent Assent: Yet there cannot be any Appropriation made of any Church or Advowson, without the Kings special Licence first obtained. For that every Appropriation is a *Mortmain*, and the Patronage of the Advowson is thereby lost and extinguished, and the person or Corporation to whom the Appropriation is made, is become Parson *impersonae*.

Concerning Appropriations of Churches or Advowsons: 1. Concerning the time when that Appropriations first begun, it is very uncertain: yet I find in Doctor *Ridley's* Book of the View of the Civil Law, that the beginning of Appropriations and discharge of Tythes, was after *Benedict* the Monk, who was the first Institutor of the Order of Monks; and *vid. Cook* 12 part, where it is said, That the Saxon Kings appropriated eight Churches

17 *E. 3.* 39. *Tr.*
16 *Car. B. R.*
Popham 144.
acc.

Churches to the Monastery of *Crowland*, as appeareth also by *Ingulphus*, who was Abbot there; and it will be a difficult thing at this day to find out when Appropriations were first made.

The Abbot of *Sulby* held the Parsonage of *Lubbenham* in the County of *L.* to his own use, which as a Parsonage Improprate came to King, *H.* the Eighth by the Statute of 31 *H.* 8. of Dissolutions. The King *Anno* 37 of his Reign granted it in Fee-farm, under which grant the plaintiff claimed: the defendant obtained a presentation from the Queen; and to destroy the appropriation, did shew the Original of it, with a condition, that a Vicarige should be perpetually endowed, which was in 22 *E.* 4. and alledged that there never was a Vicarige endowed; and therefore that the Appropriation was void: But it was Resolved by the whole Court, that the Vicarige in respect of the long continuance thereof was endowed: and in this case it was further said, that it should be dangerous now to examine the original of Appropriations of Parsonages, and endowment of Vicarages, for that the Originals of them in time will perish. *Vid.* *Pasc.* 4 *Jac.* *Cook* 12 part 3. The Lord *St. John* and Dean and Chapter of *Gloucesters* case. That Appropriations being made in antient times shall be presumed to be perfect in all points and circumstances. *Vid.* *Hill.* *A Jac.* *Cook* 12

part,

Tr. 37 *Eliz.* in
Ex Chamber,
Crimes and
Smiths case.
Cook 12 p. 4.

par. 5. *Bedle and Birds* case, Where an Ancient Impropriation made by Tenant in tail of the Advowson of the Church of *Kimbolton* to the Prior of *Stonely* and his Successors was not void, although the Grantor was but Tenant in tail.

Vid. Cook 12 p. 4. It is cited out of *Ridley* 153, and 154. The beginning of Appropriations was made after *Benedict* who was the first Institutor of Monks; anno 155, that the Saxon Kings appropriated eight Churches to the Monastery of *Crowland*.

But now further concerning Appropriations of Churches and Advowsons, Observe these Rules and Grounds of Law, and the cases proving the same; and 1. It is to be noted and observed, that no man can make any Appropriation of any Church having cure of Souls, the same being a thing Ecclesiastical, and to be made to some Ecclesiastical person, or body politick, but he only that hath Ecclesiastical Jurisdiction: and therefore in all Appropriations, the Instrument of the Appropriation is by the Bishop or Ordinary, and runs in this, or the like form, viz. *auctoritate nostra Ordinaria Ecclesiam Parochialem de B. &c. Priori, & Conventui, &c. Annedimus, appropriamus, & unimus per presentes*: But yet the *King* is such a Spiritual person, that he of himself may appropriate any Church or Advowson, because he hath the

cook 5 par. in *King*
cawdryes case.

the Ecclesiastical Jurisdiction and power in him. But no other person within the Realm, or without, but the King, or the Ordinary by Authority derived from the King, can make any Appropriation; and therefore Appropriations made by the Pope, or by Licence from and under the Pope, were never allowed of by our Law. 2. Every Appropriation must be with the License of the King, otherwise it is not good: and the License must be to the Spiritual body or person to whom the Appropriation is to be made to take the same, and not to the Bishop to make the same.

22 E. 3. 13. b. acc.

An Advowson of a Prebend holden of the King was aliened to an Abbot and his Successors: and afterwards the King granted unto the Abbot and his Successors, That the Abbot and his Successors should hold the Prebend in their own hands: yet because the first alienation was without Licence, the King did seize the Prebend notwithstanding his subsequent Grant: and that the same must be to the Spiritual Body, or person, appeareth by *Pridle and Nappers* case, *Cook* 11. p. 9. Where, upon the special verdict, it was found that the King by his Letters Patents *Licentiam dedit Priori & Conventui, &c. Quod ipsi Ecclesiam Parochialem de B. appropriare, consolidare, & incorporare, &c. & eam sic appropriatam, consolidatam & incorporatam, in proprias manus*

P. 4 Jac. 1. 12 p. 3. L. St. John and Dean and Chapter of Gloucesters Case.

nus & usus retinere possint. 3. The License to appropriate, is always general, *Quod cedente, vel decedente Rectore, &c.* And therefore an Appropriation made when the Church is full of an Incumbent, viz. as to say (that the Parson to whom the Appropriation is to be after the Church shall become void, shall be Parson, and shall retain the Gleab. and Fruits thereof to his own use) or else when the same is void of an Incumbent. In 8 Eliz. Dyer 244. an Appropriation was made by the King of a Parsonage to the Bishop of Coventry and Lichfield, when the Church was full of an Incumbent, and it was adjudged it was good, and that the Bishop had nothing in the Parsonage during the life of the Incumbent; and therefore a Lease made thereof by him to begin after such a time as the Parsonage should come to him or his Successors, was adjudged void. 4. Upon the appropriation of every Church, there must be a Vicar endowed, and a competent sum of money appointed yearly to be distributed to the poor. Tr. 36 Eliz. Higham and Beasts case. Owen 59. A Vicar was endowed to give *tertiam partem Decimarum bladorum & feni quancuncq; provenient de Manerijs de A. & B.* adjudged he shall have Tythes aswell of the Freeholders of the Mannor as of the Demeasnes of the Mannor and the Copyholds.

Vid. Stat. 4 H.
4. Of Impro-
priations.

V. Mic. 8 Jac.
in B. R. Cro. 2
p. 210. *Hunston*
& *Lockets case.*

In 38 H. 6. 21. in the Great case of Consultation which was argued in the Exchequer-Chamber, it was the opinion of the then Master of the Rolls, that an Advowson could not be appropriate without a Succession, although the Incumbent purchase the Advowson by Licence to hold to his own use. For if a Prior be seized of an Advowson to him and his Heirs, and he purchaseth Licence of Appropriation, and that he and his Successors shall hold the Advowson to their own use; yet the Advowson shall descend to his Heirs; but in such case if he will have the Appropriation good, it were best for to alien the Advowson, and to re-purchase it to him and his Successors, and then the Appropriation will be good. Lastly, all Appropriations have been usually to Corporations or persons Spiritual, and not to bodies political consisting of meer Lay-men; But whether the same may be at this day to Lay-men or to Lay-Corporations, I will not take upon me to resolve: For it was lately a question depending in the Kings Bench, and (as I take it) not yet resolved, Whether the King since the Statute of 25 H. 8. may by his Letters Patents, appropriate a Church Parochial, which was before presentative, to a Lay-Corporation, all the Members of the Corporation being but meer Lay-men.

38 H. 6. 21.

Co. 5 p. 110.
Co. 11 p. 11.
Com. 500.

Tr. 9 Car. in
B. R. Alden
and Tortell's
Case.

And thus much also briefly concerning Churches Parochial and Collegial, Presentative and Donative; and of the Union, Consolidation, and Appropriations of them, and Advowsons.

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CAP. XXIX.

*Of the power of the Ordinary;
and of his Certificate of Loyalty;
of Matrimony, Bastardy, Pro-
fession and Excommengment.*

THe power of the Ordinary is very great, both in the Judging and determining of Ecclesiastical matters and causes, of which he hath Jurisdiction, as also in the Execution of some things incident to his Office or place of Ordination.

Now the general causes Ecclesiastical; of which Ordinaries have Jurisdiction, are these, viz. Blasphemy, Apostacy from Christianity, Heresies, Schisms, Ordaining of Ministers, Institution of Clerks presented to Benefices, Celebration of Divine Service; The causes of Loyalty; of Matrimony, Divorces, general Bastardy, the Right of Tythes, and of Substractions of them: Oblations, Obventions, Dilapidations, Causes concerning the Reparation of Churches; Probate of Wills and Testaments, Administrations, and Accompts for the same: The causes of Incests, Fornications, Adulteries, So-

licitation of Chastity, Pensions, Appeals in Cases Ecclesiastical; the Censures of all which causes do properly belong to Ordinaries, to be heard and determined in their Ecclesiastical Courts: But of this general power of the Ordinary there are many restrictions, as by several cases after mentioned it will appear. And therefore, 1. Although the Ordinary may grant Administration of the goods of a person who dieth Intestate; yet he cannot dispose of the Intestate's goods before all the Debts of the Intestate be fully satisfied: And therefore the case in 7 *El.* in *Dyer* 252. was: an Action of Debt was brought against the Ordinary for the debt of the Intestate; It was the Opinion of the Justices, that after notice given of the Debt unto the Ordinary, That the Ordinary cannot dispose of the goods of the Intestate, until he hath satisfied the Debt for which the Action is brought against him.

2. If Administration be committed of the Intestates goods to one by force of the Statute of 21 *H. 8.* and the Administrator doth satisfy and pay all the Intestates Debts, and his Legacies; yet the Ordinary hath not power to dispose of the rest and residue of the Intestates goods, either to the children of the Intestate, or others, but that they shall remain to the Administrator within the Intention of the Statute of 21 *H. 8.* as it was adjudged

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ed in one *Barrows* case : which see *Pasc.* 19 *Jac.* in *Com. Ban.* in *Hobarts* Reports.

The Commissary of the Bishop of *London* granted Administration of ones goods who dyed Intestate by Word : The Administrator sold the goods and dyed : Administration *de Novo* was granted to another who sued for those goods : and the Issue was, *Si Episcopus Londonensis commisit Administrationem.* It was doubted at the first, if th: Administration granted by the Ordinary by word only was good or not ; It was at last Resolved that it was not good : *vid.* to that purpose, *Mic.* 13 *Eliz.* *Dyer* 294. 21 *E. 4.* 10 and *Cook* 9 part. 41. in *Henslows* case.

3. If the Ordinary doth demand of a Clark who is presented unto him to be Instituted into a Benefice with Cure, his Letters of Orders, or his Letters of Testimonial of his good behaviour, and the Clark doth not shew th: unto him, but departeth, and thereupon afterwards the Ordinary doth refuse him, and presents another to the Church ; in this case it is a Disturbance of the Ordinary, and a *Quære Impedit* will lie against him upon such a Disturbance : and the reason is, because the Statute doth not compel the Clark who is presented to him, either upon his Examination, or at any other time, to shew to the Ordinary his Letters of Ordination, or his Letters of

Testimonial of his good behaviour, as it was adjudged, *Pasc. 33 Eliz.* in Co. B. in *Palmer* and the Bishop of *Peterborow* case.

I said before, That of those things or causes which are meer Ecclesiastical; the Jurisdiction thereof belongeth unto the Ordinary, and he shall be the Judge thereof, and his Certificate as Judge shall bind the parties in the Kings Temporal Courts: And therefore if in Writs of Dower and other Writs brought in the Kings Temporal Courts, Issue be joyned upon *Ne unque accouple in Loyal Matrimony*, this being a Cause which is meer Ecclesiastical, the tryal thereof must be by the Bishop or Ordinary upon an Inquisition taken before him as Judge; which is after this manner, *viz.* The King first sends his Writ to the Bishop to make the Inquiry; For the Ecclesiastical Judge before he hath received the Kings Writ, may not of himself enquire of the Loyalty of the Matrimony: But after such time as he hath received the Writ to make the Enquiry, he must not surcease for any Appeal or Inhibition, but must proceed until he hath certified the Kings Courts thereof; and then when the Bishop hath received the Kings Writ, he doth give Notice thereof unto the party who took exception to the Matrimony, at his dwelling-house, if he hath any within the Diocess, to speak at a day prefixed by him against the Matrimony

trimony if he will; and after such notice given, whether the party come or not, the Witnesses of the Demandant to prove the Loyalty of the Matrimony are taken, and admitted by the Bishop, if no sufficient Exception be taken to the Witnesses. After the Depositions taken, they are published, and certified into the Kings Court where the Issue was joyned, by Letters under the Seal of the Bishop, the form of which Certificate you shall find to be after this manner, viz.

Breve Domini Regis presentibus annexum omni qua decuit reverentia accepimus; virtute cujus Brevis, vobis certificamus. Quod omnibus & singulis in Brevis illo specificat. ritè & debitè juxta juris Ecclesiastici exigentiam observat. & vocatis ex ea parte vocandis diligentem & celerem fieri fecimus Inquisitionem de rei veritate de & super materiis in brevi content. Per quam luculenter & evidenter comperimus & invenimus per legitimas Probationes, & alia in hac parte Canonice requisit. quod A. in brevi prædict. nominat. apud B. in Com N. in Diocesi N. D. in prædicto brevi similiter nominato, legitimo Matrimonio Copulata fuit. In cujus rei, &c.

By this Certificate it appeareth that the Ordinary must certify the point in issue generally, viz. That *Copulata, vel non Copulata fuit in legitimo Matrimonio*, and must not make a special Verdict of it, or express the manner of the Marriage at

14 Eliz. Dyer.
303.313.

large. And after such Certificate made, there shall be no Appeal, but the same Certificate shall be a Bar, and conclude all parties for ever: and after such Certificate and Re-summions of the Tenant in the Kings Temporal Court, Judgement shall be given for the Plaintiff. Hill. 9 Car. *Wickham and Enfields case.* 1 Cro. 351.

Hil. 9 Car.
Wickham and
Enfields case.
1 Cr. 351.
10 R. 2 Tryal
100.

If a Writ of Dower be brought against the Bishop of N. and others by several *Præcipes*, and they plead that the Demandant *Ne unque fuit accomplie en loyale Matrimony*: yet shall the Writ go to the same Bishop to certify the Loyalty of Matrimony, and not unto the Metropolitan. For although the Bishop be a party to the Writ, and Defendant in the cause; yet because there are other parties and defendants besides himself, who shall be bounden by his Certificate; it shall be presumed that the Bishop will do right; and therefore he himself shall be judge of the Matrimony: But if the Bishop himself alone had been Defendant, and had pleaded such a plea to Issue, there he shall not try the Matrimony; for then he should be Judge in his own cause, which the Law will not suffer; and therefore the Certificate shall be by the Metropolitan: But if in a Writ of Dower, or other Writ, the Issue to be tried be, Whether *Alice* the demandant was the Wife of *I.S.* or not, the same shall not be tried by the

39 E 3. 15.

cer-

Certificate of the Bishop, but by a Jury at the Common Law. *Quare Impedit* brought against the Arch-Bishop, the Bishops and others. The Bishops plead; the one he claims nothing but as Metropolitan: The other nothing but as Ordinary. judgment is given against the other Defendants; and the Writ awarded *Metropolitano*. It was objected, it ought to be *Episcopo*. Resolved, It may be to the one or the other at the election of the party. *Mich. 13 Jac. B. R. Grange and Denny's case. Bolstr. 3 part, 174.*

Bastardy is an Ecclesiastical Cause; and if general Bastardy be pleaded in disability of the plaintiff, the same shall be tried by the Certificate of the Bishop, whether it be in a real or a personal Action: But if it be pleaded that the plaintiff was born at such a place before the Marriage was solemnized, *Et issint Bastard*, this is a special Bastardy, and shall be tryed by a Jury at the Common Law, where the birth is alledged. *Vid. 8 Eliz. C. B. Simonds case. Leon. 3 part, 11.* If general Bastardy be pleaded against one who comes in as Vouchee, and is not party to the Writ, it shall be tryed by the Country.

Trin. 6 Eliz. Per Curiam, if Issue be joyned: If the Church be void by Cession, Deprivation or Assignment, it shall be tried by the Country, because it is a thing mixt; for the Avoydance is Temporal, and the Deprivation is Spiritual. But of dis-

Cook 8 part,
the Abbot of
Strat. Mervell-
lms Case.
4 E. 4. 15.

38 E. 3. Lib.
Ass. 24.
41 E. 3. 11.
1 H. 6. 3. acc.

disability, Bastardy, or *unique accouple*, of loyal Marrimony, because the Loyalty of them and their validity is to be certified and not if they be *de jure* done or not, and not *de facto*, it shall be tryed by the Certificate of the Bishop : *Moor 61 acc.*

40 E.3.27. by
Belknap.

21 E.3. Tryal
98.

2 R.3.4. cont.

Profession is another SPiritual thing, and tryable by the certificate of the Bishop : For so was Profession alledged in a Knight of the Order of *St. Johns of Jerusalem* in *England* tryed by the certificate of the Bishop where the Profession was alledged.

9 H.7.2. by
Huffey.

In 9 H. 7. 2. by *Huffey*, If a man plead Profession in another man, which is traversed; it shall be tryed by the certificate of the Ordinary : But if he plead, that at the time of the making of such a Deed, or the doing of such a thing, that the party was professed in some Order of Religion, the same shall be tryed by a Jury at the Common Law, because the Profession refers to a certain time : But if Profession or Bastardy be alledged in a stranger who is no party to the Writ or Action brought, there the Profession, or Bastardy shall be tryed by a Jury at Law : For that if the tryal should be by the Ordinary, and he make his certificate of the same, the same remains a Record for ever, and the same should conclude and bind the party for ever : for that he cannot aver against it ; which would be dangerous and prejudicial to him who is a stranger to the Writ.

43 E.3.37.6.
33 E.3. Tryal
90.

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Writ. *Tr.* 31 *Eliz.* in Com. Ban. *Leon.*
 1 par. 208. By *Periam*, In an Action
 against Executors: If the Issue be whe-
 ther the Executors did refuse before such
 a day, or after, the trial shall be by Jury:
 contrary where the Issue is upon refusal
 general, there it shall be tried by the
 Certificate of the Bishop or Ordinary, be-
 cause the refusal is before him as Judge.
 If an Issue be joyned, That Administra-
 tion was not committed to the Probator,
 or that the Testament was not proved
 before the Ordinary, It shall not be tried
 by the Certificate of the Ordinary, but
 by the Country; because that originally,
 the Probat of Wills and Testaments did
 not belong to the *Comusans* of the Judges
 Ecclesiastical, but that was given to
 them but of late time. *Vid. Cook* 4 par.
 in *Henstoes* Case.

Admission and Institution are also
 Spiritual things, and shall be tried by the
 certificate of the Bishop; For Institution
 is but the Letter of the Bishop, of which
 a Jury cannot take notice. But Indu-
 ction is a Temporal thing, and shall be
 tried by a Jury at the Common Law.
Tr. 15 *Jac.* *Middleton* and *Lawtes* case
 adjudged, acc. *Tr.* 12 *Jac.* C. B. Sir
Timothy Huttons case. *Hob.* 15, 16.
 acc.

Excommunication is another Spiritual
 thing; and if it be pleaded in disability
 of the party in the Temporal Court, the
 same

22 H. 6. 27. a.

28. 6.

9 H. 5. 9. b.

21 H. 6. 28.

2 H. 4. 17.

12 H. 4. 11.

32 H. 6. 24.

27. acc.

21 E. 4. 8. acc.

Co. 1 part,

Instit. 134.

41 E. 3. 10.

12 E. 4. 15.
20 H. 6. 17.
20 E. 3. Ex-
commeng. 20.

20 H. 6. 1.
8 H. 6. 3. acc.

11 H. 4. 64. in
Debt.
7 E. 4. 14. acc.

16 E. 3. Ex-
commeng. 4.
4 H. 7. 15.
14 H. 4. 14.
Dr. & Stud.
125. acc.

33 E. 3. Ex-
commeng. 29.
Viſ. M. 40 E.
in Beamonds
Caſe. Moor
467.
9 H. 7. 21.
7 E. 4. 14.
Cook 8 p. in
Trollops Caſe.

ſame muſt be certified thither by the Bi-
ſhop himſelf : For no man can certify an
Excommengment but onely the Biſhop
who is the immediate Officer to the Kings
Temporal Court to that purpoſe . But
if the Biſhop be *in remotis*, or (*ſede va-
cante*) an Excommengment certified by
the Guardian of the Spiritualties is ſuffici-
ent. An Excommengment certified by
the Commiſſary or Official of the Biſhop
is not good at this day, although in an-
cient times the ſame hath been allowed.

If the Pope, or any other having For-
reign Authority do excommunicate any
Subject of the Realm of *England*, or
the Dominions thereof, the ſame is no
diſability of his perſon ; for that the
Common Law diſallows of all Acts
done by Forreign power in the diſſability
of any Subject within this Realm. The
Certificate of a Biſhop who is dead, is
not to be allowed : 14 E. 3. & 8 E. 2.
Leon. Kane. Excommeng. 8 & 26. acc.

If a Biſhop certiſieth the Kings Tem-
poral Courts, that another Biſhop certi-
fied him that the party is Excom-
municated in his Dioceſs, this Certificate
upon the Certificate or Report of ano-
ther is not good, nor allowed of in our
Law : For the Biſhop muſt certify the
party to be Excommenge upon his own
knowledg. But if a man be Excommunicate
by the Commiſſary of the Biſhop or his
Official, the ſame being done in the Bi-
ſhops

shops Right; and in his Court, is sufficient, although the same be not certified into the Kings Courts under the Seal of the Bishop.

If a Bishop be a defendant in an Action brought against him, an Excommengment of the plaintiff in that Action certified by him to have been in his own Court, is not allowed of to be pleaded in disability of the plaintiff; for that the Bishop shall not be a Judge in his own cause, and the Kings Temporal Courts shall intend the same to be in the same cause.

5 E. 3. 8.
16 E. 3. Ex-
commeng. 10.
9 H. 7. 21.
Vid. 8 E. 3.
Co. 437.

Mic. 3 Jac. B. R. L. Aburgaveny and Edwards case, An Excommengment was pleaded, and the Certificate of the Bishop of *Landaff*, without mention in it by what Bishop he was Excommunicate; Resolved the Certificate was void. *Moor* 775. acc.

F I N I S.